Supreme Court, U.S.
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No. 06-

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EUGENE D. GULLAND
Counsel of Record
JOSHUA DOAN
ZACHARY G. PARKS

COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000
Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the court below erred in holding that respondent may relitigate the same non-merits issues that were finally and validly decided in a D.C. Circuit judgment deferring to potentially dispositive proceedings pending in South Africa and therefore dismissing respondent's claims "without prejudice."

2. Whether the court below erred in (i) ruling that an action to confirm a foreign arbitration award justifies a broader exercise of personal jurisdiction over a South African company than would otherwise be permissible under governing Due Process principles and (ii) applying "Third Circuit case law interpreting the Due Process Clause" instead of "D.C. Circuit law" that is consistent with governing Due Process principles established by this Court's decisions.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE

The parties to the proceeding before this Court are Telkom S.A., Ltd. ("Petitioner" or "Telkom") and Telcordia Technologies, Inc. ("Respondent" or "Telcordia").

Telkom has no parent company. The Public Investment Corporation Limited is the only publicly held company that owns 10% or more of Telkom's stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Aug. 14, 2006) is reported at 458 F.3d 172. (App. 1a-15a.) The Third Circuit reversed an unreported order of the United States District Court for the District of New Jersey (Jan. 24, 2005), which had dismissed with prejudice Telcordia's petition to confirm an arbitration award by reason of the previous adjudication of the same issues in the D.C. Circuit. (App. 16a-17a.) The Third Circuit also reversed the district court's unreported supplemental opinion (Feb. 15, 2005), which had dismissed the confirmation petition for lack of personal jurisdiction. (App. 18a-30a.)

The opinion of the United States District Court for the District of Columbia previously dismissing Telcordia's virtually identical confirmation petition (July 22, 2003) is unreported. (App. 31a-40a.) The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the district court's dismissal (Apr. 9, 2004) is available at 2004 WL 784074. (App. 42a-44a.)

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was issued on August 14, 2006. (App. 1a.) This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

This case concerns the Due Process Clause of the Fourteenth Amendment, which provides that no "State shall deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

This case also involves the provisions of 9 U.S.C. § 201, *et seq.*, and the Convention on the Recognition and

Enforcement of Foreign Arbitral Awards of June 10, 1958 ("New York Convention"). Both are set out in the Appendix. (App. 45a-47a, 48a-57a.)

STATEMENT OF THE CASE

In an action involving the same claims and the same parties as the case below, the D.C. Circuit previously issued a final judgment dismissing Telcordia's petition to confirm the South African arbitral award at issue here. The D.C. Circuit unanimously ruled that, under Article VI of the New York Convention, it was appropriate to defer to the courts of South Africa, which had annulled the award as inconsistent with South African law and arbitration procedures.

Under the New York Convention, the courts of the arbitral forum (in this case, South Africa) have exclusive jurisdiction to determine the validity of an award and an invalid award cannot be enforced elsewhere.[1] The dismissal of Telcordia's D.C. confirmation petition was without prejudice because Telcordia had appealed the annulment order in South Africa and might bring a new petition to confirm the award if the award were reinstated. (The South African proceedings are still pending.) Because it was dismissing the case, the D.C. Circuit did not review the D.C. district court's ruling that

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[1] "There appears to be no dispute among [the leading] authorities that an action to set aside an international arbitration award is controlled . . . by the domestic law of the rendering state * * * * '[T]he validity of the award . . . was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of the local courts at the seat of arbitration.'" *Yusuf Ahmed Alghanim v. Toys "R" Us*, 126 F.3d 15, 21-22 (2d Cir. 1997) (citations omitted); *see also Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd.*, 191 F.3d 194, 196 (2d Cir. 1999).

there was no personal jurisdiction over Telkom. (App. 43a.)

Telcordia almost immediately filed another petition to confirm the award in the New Jersey district court. After extensive proceedings and a half-day hearing, the court dismissed the petition with prejudice, recognizing that (1) the same issues had been adjudicated by the D.C. Circuit, and (2) there was "no basis to assert personal jurisdiction over Telkom." (App. 16a, 24a.) The New Jersey district court also ruled, in the alternative, that it was appropriate to dismiss without prejudice under Articles V and VI of the New York Convention in deference to the South African appellate proceedings. (App. 17a.)

The Third Circuit reversed the district court's decision to dismiss with prejudice. Without citing any supporting authority, the court of appeals concluded that rulings of sister courts on procedural issues not disposing of the substantive merits of a case are not entitled to preclusive effect. The court therefore refused to consider itself bound by the D.C. Circuit's decision to defer to the South African courts. (App. 11a-13a.) The court also reversed the New Jersey district court's holding (like that of the D.C. district court) that exercise of jurisdiction over Telkom would not comport with traditional notions of fair play and substantial justice. (App. 11a.) The Third Circuit concluded that personal jurisdiction could be exercised over Telkom because relaxed standards should apply to an action to enforce an international arbitration award (App. 10a-11a), and because of the need to apply "Third Circuit law" rather than view issues through "the lens of D.C. Circuit law" (App. 9a).

A. Background

Petitioner Telkom is a South African telecommunications corporation. (App. 18a.) Respondent

Telcordia is a Delaware corporation based in New Jersey. (App. 18a.) Telkom does no business in the United States; it has no agents, officers, property, or bank accounts here; and it holds no investment in any U.S. company. Formerly the state-owned telephone monopoly, Telkom was privatized in 2004 and is an ordinary commercial company.

Telkom buys equipment through public requests for bids ("RFB"), to which interested suppliers respond. (App. 19a.) In October 1998, Telkom issued an RFB in South Africa for telecommunications software to be installed and used in South Africa. (App. 25a.) After Telcordia outbid 18 other companies of various nationalities, Telkom and Telcordia entered into a contract known as the "Integrated Agreement" or "IA." (App. 19a.)

The New Jersey district court (as had the D.C. district court) found that all aspects of negotiation and performance of the Integrated Agreement were based in South Africa:

> "the parties' negotiations occurred [in South Africa]; the IA was signed in Pretoria; Telcordia was required to open an office there from which to perform the contract; the IA was governed by South African law; any disputes were to be arbitrated there; the parties submitted to the jurisdiction of the South African courts; and the vast majority of the parties' dealings took place in South Africa." (App. 25a.)

The district court also found that all the "[k]ey Telcordia personnel relocated to South Africa, all deliveries were made in South Africa, and Telcordia rendered its invoices to Telkom in South Africa." (App. 19a.)

Disputes arose about whether Telcordia's software complied with contractual specifications. (App. 2a.) In

early 2001, both parties cancelled the IA, each claiming breach by the other. (App. 20a.) Arbitration proceedings were convened in Johannesburg, with an English barrister appointed as sole arbitrator. (App. 20a.)

During hearings, Telkom's counsel became concerned that the arbitrator was applying English rather than South African law. (App. 20a.) As authorized by the IA's governing law, Telkom invoked Section 20 of the South African Arbitration Act, which allows referral of legal questions "at any stage" of a South African arbitration to the South African courts. After the arbitrator expressed reluctance to follow this procedure, Telkom applied to the High Court for review of the disputed issues of South African law. The arbitrator later submitted a "Memorandum" to the High Court urging it not to entertain the application. That same day, without waiting for the High Court's decision on Telkom's application, the arbitrator issued an award in favor of Telcordia. (App. 20a.)

B. Proceedings in South Africa and in the D.C. Federal Courts

Telkom moved to set aside the award in the South African courts pursuant to Section 33 of the South Africa Arbitration Act. Under Article V(1)(e) of the New York Convention, the South African courts have authority to set aside the award under local law because they are the "competent authority of the country in which, or under the law of which, that award was made." Telkom argued that the award should be set aside because, among other things, the arbitrator had improperly refused to allow the High Court to rule on the Section 20 application, "not afford[ed] Telkom a fair hearing," refused to convene a promised "further oral hearing" to consider evidence pertinent to the award, and exceeded his powers under South African law. (App. 20a.)

Meanwhile, Telcordia was seeking to enforce the award in the District of Columbia district court pursuant to 9 U.S.C. § 203. That court dismissed its petition. (App. 31a.) It held that the exercise of personal jurisdiction over Telkom "would not comport with 'traditional notions of fair play and substantial justice,'" (App. 37a (*quoting Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945))), finding that Telkom "reasonably expected . . . not to be haled into court here . . . because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa" (App. 36a). The district court alternatively dismissed on grounds of *forum non conveniens*. (App. 38a-39a.)

During the pendency of Telcordia's appeal to the D.C. Circuit, the High Court in South Africa set aside the arbitral award on grounds that the arbitrator breached multiple duties under South African law. (App. 20a.) Then, on April 9, 2004, the D.C. Circuit affirmed the D.C. district court's judgment. (App. 42a-44a.) Relying on its power to "affirm a judgment on any ground that [was] properly raised below, even if the district court did not rely on it," the court held that the case should be dismissed pursuant to Article VI of the New York Convention, which had been extensively argued in the D.C. district court proceedings:

> "Article VI . . . allows a district court to 'adjourn' a decision on the enforcement of the arbitral award if 'an application for the setting aside or suspension of the award has been made to a competent authority . . . .' Telkom made such an application to the High Court of South Africa. (On November 27, 2003, after Telcordia filed this appeal, the High Court issued a decision setting aside the partial award, which Telcordia says it intends to appeal.)." (App. 43a.)

The D.C. Circuit dismissed Telcordia's petition "without prejudice," so that Telcordia might refile if the South African courts reinstated the award. (App. 44a.)

C. Proceedings in the New Jersey District Court

Instead of awaiting its hoped-for reinstatement of the award by the South African Supreme Court of Appeal and then refiling in the D.C. district court, Telcordia filed essentially the same confirmation petition in the New Jersey district court several weeks after the D.C. Circuit dismissed its first petition. Invoking the district court's subject matter jurisdiction under 28 U.S.C. § 1331 and 9 U.S.C. § 203, Telcordia contended that because the D.C. Circuit's dismissal was "without prejudice," the decision had "no preclusive effect." (Pet. to Confirm Partial Arbitral Award and Compel Further Arbitration, No. 04-2463, at 18 (D.N.J. May 26, 2004).)

The New Jersey district court dismissed the petition on three grounds. First, it dismissed with prejudice because "principles of issue preclusion or estoppel [did] not permit [Telcordia] to relitigate the judgment of the U.S. Court of Appeals for the District of Columbia Circuit." (App. 17a.) Second, the court (like the D.C. district court) found that there was "no basis to assert personal jurisdiction over Telkom" because "the parties anchored their contractual relationship to South Africa, expressly consented to the jurisdiction of the South African courts, and agreed that South African law would govern their agreement." (App. 24a, 28a-29a.) Third, as an alternative holding, the court "dismissed without prejudice" because, if it were not precluded from reconsidering the issues decided by the D.C. Circuit, it would also dismiss the case pursuant to Article VI of the New York Convention. (App. 17a.)

D. The Decision Below

Reversing the New Jersey district court's "with prejudice" dismissal of Telcordia's petition, the Third Circuit held that Telcordia could relitigate its confirmation petition in New Jersey because the D.C. Circuit's judgment was not a decision "on the merits." (App. 11a-12a.) Reviewing the issue anew, however, the Third Circuit affirmed the New Jersey district court's decision to dismiss "without prejudice" under Article VI of the New York Convention. (App. 14a-15a.)

The Third Circuit also reversed the district court's ruling on personal jurisdiction. Disregarding the undisputed facts that had led two district courts to conclude that it would be unfair and unreasonable to compel Telkom to litigate a South African-based dispute in the United States, the Court observed that a relaxed standard of personal jurisdiction should apply because "the proceeding was for the enforcement of a foreign arbitral award, rather than adjudication on the merits." (App. 9a-11a.) Furthermore, the Court concluded that personal jurisdiction should be determined "through the lens of Third Circuit law" rather than "D.C. Circuit law." (App. 9a.) On this basis, the Court thought that exercise of personal jurisdiction over Telkom was reasonable because Telkom had purchased "customized merchandise" from a New Jersey corporation, had failed to wire a payment to a New Jersey bank, and had sent representatives to New Jersey at Telcordia's urgent suggestion after problems arose in the software. (App. 10a.)

REASONS FOR GRANTING THE WRIT

The court below should have simply affirmed the district court's conclusion that issue preclusion principles prevented Telcordia from relitigating its claims in New Jersey. Instead, it refused to respect the finality of the

D.C. Circuit's judgment and reached out to decide the question of personal jurisdiction in a manner that, to the eyes of South Africans and probably others, suggests an aim to protect the interests of a New Jersey company that the court thought would not be protected adequately in the D.C. Circuit or elsewhere. In deciding the case as it did, the Third Circuit brought itself into conflict with decisions of this Court and other courts of appeal. These actions warrant the exercise of this Court's supervisory power.

First, the Third Circuit's willingness to allow relitigation of the issues decided by the D.C. Circuit squarely conflicts with decisions of this Court and many courts of appeal holding that principles of issue preclusion bar relitigation of procedural rulings that do not dispose of the merits of a case. By allowing Telcordia to prosecute a new confirmation petition in New Jersey despite the D.C. Circuit's ruling that U.S. courts should defer to the South African proceedings, the Third Circuit not only forced Telkom to litigate the case a second time but also stated a rule that allows Telcordia to file new confirmation petitions in district courts throughout the nation in hope of finding one that will confirm the award. The Third Circuit's refusal to respect the finality of the D.C. Circuit's judgment cannot be limited to cases involving confirmation of arbitral awards. It authorizes relitigation of all kinds of dispositions that do not reach the underlying merits of a dispute and invites conflicting decisions by courts in different circuits even in the same cases.

Second, the flaws in the Third Circuit's ruling on personal jurisdiction go well beyond its disregard of the undisputed facts that led two district courts to find that it would be unfair and unreasonable to force Telkom to litigate a South African dispute in the United States. The court applied a principle, which has been rejected by three other courts of appeal, that foreign persons are amenable

to personal jurisdiction in proceedings to enforce arbitral awards under standards that are more relaxed than in cases on the merits. Such an unprecedented rule can only discourage foreign companies from entering into arbitration agreements with U.S. firms, and fails to heed the admonition that courts should take "great care and reserve" in exercising personal jurisdiction over foreign persons. *Asahi Metal Indus. Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 115-16 (1987). Finally, in its attempt to justify its conclusion that "customized merchandise" sold by a New Jersey-based company and Telkom's failure to wire payments to New Jersey subjected Telkom to personal jurisdiction in the U.S., the Third Circuit stressed the need to apply Third Circuit caselaw, rather than law from the D.C. Circuit or elsewhere. (App. 9a.) This ignores, of course, the uniform constitutional standards of due process that apply throughout the United States. The special Third Circuit standards applied in this case deviate from the principles that personal jurisdiction may be exercised only where a party "purposefully avails itself of the privilege of conducting activities within the forum state," *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985), and may not be exercised in circumstances inconsistent with "fair play and substantial justice," *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal citations omitted).

I. REVIEW IS WARRANTED TO CORRECT THE THIRD CIRCUIT'S FAILURE TO RESPECT THE FINALITY OF THE D.C. CIRCUIT'S JUDGMENT, UNDER A STATED RULE THAT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

In stating a general rule that only "a decision on the merits [is] entitled to preclusive import," (App. 12a), the Third Circuit ignored this Court's decisions applying principles of issue preclusion to non-merits dispositions,

departed from the uniform rule applied in other circuits, and invented a sweeping exception that encourages mischievous relitigation of issues and conflicting dispositions of cases among courts in different circuits.

A. The Third Circuit's Holding Conflicts With Decisions Of This Court..

Issue preclusion, sometimes called direct or collateral estoppel, embodies the principle that "an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim." *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998). This "ancient rule" "'has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it, an end could never be put to litigation.'" *San Remo Hotel, LP v. San Francisco*, 545 U.S. 323, 336-37 (2005) (*quoting Hopkins v. Lee*, 6 Wheat. 109, 114, 5 L.Ed. 218 (1821)). This Court has repeatedly applied issue preclusion broadly enough to achieve its purpose of preventing relitigation of decided issues:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in *every case* where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin v. Iowa State*

Traveling Men's Ass'n, 283 U.S. 522, 525-26 (1931) (emphasis added).

Other decisions state the rule no less emphatically.[2]

The rule applies whether the earlier court's dismissal reached the substantive merits of the case or turned on a procedural ground. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, for example, this Court applied issue preclusion to a non-merits decision, holding that "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations — both subject matter and personal." 456 U.S. 694, 702 n.9 (1982) (citations omitted).[3]

Ignoring these principles, the Third Circuit justified its refusal to respect the D.C. Circuit's judgment by applying an overly-narrow definition of issue preclusion. Because the D.C. Circuit's dismissal was "without prejudice" to Telcordia's right to refile if the award was reinstated in South Africa, and because it did

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[2] In *New Hampshire v. Maine*, for example, the Court stated that issue preclusion prevents relitigation of an issue of law or fact "actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim." 532 U.S. 742, 748-49 (2001); *see also Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("[i]ssue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided"); *S. Pac. R.R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) ("a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground for recovery, cannot be disputed in a subsequent suit between the same parties or their privies . . . .").

[3] The Court in that case used "res judicata" to refer to issue preclusion. *See Migra*, 465 U.S. at 77 n.1 ("The preclusive effects of former adjudication . . . are referred to collectively by most commentators as the doctrine of 'res judicata.'").

not "constitute a decision on the merits," the Third Circuit ruled that the prior decision was not "entitled to preclusive import." (App. 12a.) But this Court's decisions leave no room for such an exception to issue preclusion. Rather, they establish that the doctrine applies to "every case" where a court has issued a final and valid decision, not just those cases where a court dismisses with prejudice or those cases where a court dismisses by reaching the substantive merits of the underlying claim. *See Baldwin*, 283 U.S. at 526.

B. The Decision Below Conflicts With The Decisions Of Every Other Regional Court Of Appeals.

Not surprisingly, the decision below conflicts with the decisions of every other regional court of appeals. (The Federal Circuit apparently has not addressed the issue.) Each regional court of appeals has recognized that issue preclusion prevents courts from reconsidering decisions of other courts, even where the other court dismissed the case without prejudice or without reaching the merits.

Deutsch v. Flannery, 823 F.2d 1361 (9th Cir. 1987), is representative of the many decisions in conflict with the decision below. In that case, the Southern District of New York dismissed a securities lawsuit without prejudice, holding that the complaint failed to plead fraud with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure. The plaintiff then filed, in the Northern District of California, a new complaint with new allegations of fraud for most of the claims, but essentially the same allegations for one of the claims. The Ninth Circuit affirmed the district court's dismissal of the unchanged claim on issue preclusion grounds. *Id.* at 1364-65. Even though the decision of the Southern District of New York did not reach the merits of the

plaintiff's claim and was without prejudice, issue preclusion still applied:

> "The litigation of an issue presented and necessarily decided in a prior action between the same parties is foreclosed by the doctrine of issue preclusion. *It matters not that the prior action resulted in a dismissal without prejudice*, so long as the determination being accorded preclusive effect was essential to the dismissal." *Id.* at 1364 (citations omitted) (emphasis added).

The other regional courts of appeal and commentators all agree that issue preclusion applies to a prior final judgment that was without prejudice or did not decide the merits.[4]

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[4] *See In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) ("[A dismissal 'without prejudice'] must mean without prejudice as to the substantive cause of action. The dismissal is with prejudice on the issue of the obligation to make a demand on the directors with respect to that substantive complaint."); *Grieve v. Tamerin*, 269 F.3d 149, 154 (2d Cir. 2001) (district court decision concluding that *Younger* abstention was appropriate precluded plaintiff from asserting that *Younger* abstention was inappropriate before another district court); *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1069 (4th Cir. 1993) ("a jurisdictional dismissal that does not constitute a judgment on the merits so as to completely bar further transactionally-related claims still operates to bar relitigation of issues actually decided by that former judgment"); *Duffy & McGovern Accommodation Serv. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 830 (5th Cir. 2006) (holding that a decision on "any issue of fact or law, trivial or non-trivial, is preclusive" if the decided issue was actually litigated and necessary to a final judgment and is identical to and reviewed under the same standard as the present issue); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir. 1977) (holding that issue preclusion applies to jurisdictional dismissals); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) ("A dismissal for lack of jurisdiction precludes relitigation of the

(...continued)

Strikingly, the decision below also conflicts with prior Third Circuit law. *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977), arose after a federal district court in New York had dismissed a complaint on grounds of *forum non conveniens*, holding the appropriate forum was England. Plaintiffs sought to litigate the same claims in Delaware federal district court.

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issue actually decided, namely the jurisdictional issue.") (citation omitted); *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112 (8th Cir. 1999) ("[A]n *issue* actually decided in a non-merits dismissal is given preclusive effect in subsequent action between the same parties . . . .") (emphasis in original); *Park Lake Resources LLC v. Dept. of Agriculture*, 378 F.3d 1132, 1133 (10th Cir. 2004) (applying issue preclusion to dismissal on ripeness grounds); *United States v. Dean*, 752 F.2d 535, 541 n.14 (11th Cir. 1985) ("One exception to [the] general rule [that a prior decision will have *res judicata* effect only if it was a decision 'on the merits'] is that a prior decision not 'on the merits' will have *res judicata* effect as to issues that were actually decided."); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999) ("[U]nder principles of issue preclusion, even a case dismissed *without* prejudice has preclusive effect on the jurisdictional issue litigated") (emphasis in original).

The Restatement and commentators agree that issue preclusion applies regardless of whether the first decision was on the merits. Restatement (Second) of Judgments § 20 cmt. b (1982) ("The rules of issue preclusion apply to a valid and final personal judgment for the defendant even though the judgment is one which, under this Section, does not bar another action on the same claim [i.e., a judgment that is not 'on the merits'].."); 18 Charles A. Wright et al., *Federal Practice and Procedure* § 4418 (2d ed. Supp. 1981) ("[t]he most common applications of direct estoppel arise from dismissal of a first action on grounds that do not go to the merits of the claim presented and that are not intended to preclude a second action. Preclusion of the issues that led to dismissal *is not defeated* by the fact that for some purposes the judgment is not 'on the merits.'") (emphasis added).

The Delaware district court dismissed on issue preclusion grounds and the Third Circuit affirmed, rejecting the argument that issue preclusion applies only to decisions "on the merits" and not to "matters in abatement which may involve the exercise of discretion." *Id.* at 853. It held that "[a] non-merits judgment following a plea in abatement . . . does create a direct estoppel as to matters which were actually adjudicated." *Id.* The court then quoted from the Restatement of Judgments:

> "Although, where the judgment for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated in the prior action. . . . The matter actually litigated and determined is res judicata between the parties in a subsequent action involving the same matter, whether the subsequent action is based upon the same or a different cause of action." *Id.* (*quoting* Restatement of Judgments § 49 cmt. b (1942)).

The court below attempted to distinguish *Pastewka* in a cryptic footnote: "Unlike here, the plaintiffs in *Pastewka* were precluded from bringing their suit in New York. Here, it is undisputed that Telcordia could rebring the petition in the D.C. District Court once a set of events have [sic] passed." (App. 12a n.8.) The "set of events" referred to is Telcordia's continuing efforts to reinstate the award through its South African appeal. This "set of events" has not "passed" and the Third Circuit does not explain why Telcordia should be allowed in the meantime to relitigate its confirmation petition despite the D.C. Circuit's deferral to the South African courts. Issue

preclusion plainly applies to final judgments, like the D.C. Circuit's in this case, imposing a precondition to suit.[5]

C. The Third Circuit's Apparent Confusion Of Claim Preclusion And Issue Preclusion Results In A Rule With Pernicious Consequences.

Because the Third Circuit cites no authority for its rule that issue preclusion applies only to a decision on the merits, it is difficult to understand its reasoning. It appears, however, that the court may have confused the doctrines of issue preclusion and claim preclusion.

Allen v. McCurry contrasted the two doctrines:

> "Under res judicata [claim preclusion],[6] a final judgment *on the merits* of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Under collateral estoppel [issue preclusion], once a court has decided an issue of fact or law necessary

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[5] *See* Restatement (Second) of Judgments § 20(2) ("A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted *after* the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law. . . . *The issue of maturity, on the other hand, is properly foreclosed.*") (emphases added); *see also Park Lake*, 378 F.3d at 1134 (holding that plaintiffs "[could] not proceed with their claim" because they "[could] overcome the previous dismissal only by showing satisfaction of the conditions for ripeness set forth in" the original judgment.).

[6] In *Migra*, this Court explained that the *Allen* Court "used the term 'res judicata' in a narrow sense, so as to exclude issue preclusion or collateral estoppel." 464 U.S. at 77 n.1.

> to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." 449 U.S. 90, 94 (1980) (citation omitted) (emphasis added.)

Thus, claim preclusion applies where a court has rendered a "final judgment on the merits," which means that the original decision must have "passe[d] directly on the substance of a particular claim before the court." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501-02 (2001) (citation, quotation marks and brackets omitted). Claim preclusion does not apply "[i]f the [former litigation] was dismissed . . . on any ground which did not go to the merits of the action." *Hughes v. United States*, 4 Wall. 232, 237, 18 L.Ed. 303 (1866). Issue preclusion, by contrast, applies to final judgments even if they do not reach the substantive merits of the claim. *See Allen*, 448 U.S. at 94.

Issue preclusion and claim preclusion also differ in their effect. Claim preclusion bars relitigation of "not only . . . matters actually presented to sustain or defeat the right asserted in the earlier proceeding, but also . . . any other available matter which might have been presented to that end." *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940) (citations and quotation marks omitted). Issue preclusion, however, does not necessarily bar future lawsuits arising out of the claim that was originally dismissed. If the claim can be heard without relitigating an issue already decided, issue preclusion will not prevent a claim from going forward. *See, e.g., Compagnie des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 360-61 (3d Cir. 1983).

The Third Circuit's confusion is suggested by its observations that (i) only a "decision on the merits [is] entitled to preclusive import" and (ii) the New Jersey district court's dismissal of the confirmation petition with

prejudice on issue preclusion grounds would preclude Telcordia from ever bringing a future confirmation action even if the award were reinstated. (App. 11a-12a.) While those two points correctly apply to a final judgment on the merits invoking *claim* preclusion, neither is true of *issue* preclusion. Issue preclusion prevents relitigation of the confirmation issues while the South African proceedings seeking to reinstate the award are continuing. Telkom's position below was entirely consistent with this principle.[7]

The Third Circuit's erroneous decision undermines each of the three important objectives of issue preclusion: protection from "the cost and vexation of multiple lawsuits, conser[vation of] judicial resources, and, by preventing inconsistent decisions, encourage[ment] [of] reliance on adjudication." *Allen*, 449 U.S. at 94.

A broad rule allowing relitigation of judgments not disposing of the merits will enable litigants who are unhappy with a dismissal elsewhere to try again in the Third Circuit. The prevailing party will be compelled to litigate the case anew, as Telkom was forced to do. Federal judicial resources will also be consumed in serial relitigation of the same issues.

By allowing such relitigation, the Third Circuit's rule will undermine the conclusiveness of court judgments. Losing parties across the country may seek to refile in a district court of the Third Circuit. At least some of those cases are likely to result in decisions that directly conflict with the earlier decisions. Stated differently, the Third Circuit rule opens a new avenue for collateral

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[7] Telkom acknowledged that "Telcordia may file a new enforcement action in the U.S. if the award is reinstated in the South African appeal." Br. for Resp. in Third Circuit, No. 05-1651, at 20 (3d Cir. June 9, 2005); *see also id.* at 22, 30.

attack on valid and binding judgments from courts in other circuits.

II. REVIEW IS WARRANTED TO CORRECT THE THIRD CIRCUIT'S EXERCISE OF PERSONAL JURISDICTION ON GROUNDS THAT CONFLICT WITH DECISIONS OF THREE OTHER COURTS OF APPEAL AND OF THIS COURT.

The Third Circuit should not have reached the question of personal jurisdiction because it should have dismissed Telcordia's petition as an improper effort to relitigate the D.C. Circuit's judgment. In addressing the issue, moreover, the Third Circuit's decision departed from the holdings of three other courts of appeal, and failed to heed the uniform Due Process standards established by this Court.

The Third Circuit's application of erroneous legal standards results in a sweeping assertion of personal jurisdiction over foreign persons that could discourage business transactions between them and U.S. suppliers, and trigger controversy with other nations over the breadth of jurisdiction claimed by U.S. courts.

A. The Third Circuit's Special Due Process Standard For Arbitral Award Enforcement Cases Conflicts With the Holdings of Three Other Federal Courts of Appeal.

It was undisputed that Telkom is not present in the United States and has no property here. Applying the familiar "minimum contacts" analysis, the two district courts each held that it would be unfair and unreasonable to require Telkom to appear and defend itself in the United States. Lower federal courts have uniformly ruled that, in order to confirm an international arbitral award rendered against a foreign person, a court must have

jurisdiction over that entity's person or its property under circumstances making exercise of jurisdiction reasonable under the Due Process Clauses of the Fifth or Fourteenth Amendments.[8] We are aware of no decision agreeing with the Third Circuit that a special, relaxed standard of minimum contacts should apply to a "proceeding . . . for the enforcement of an arbitral award, rather than adjudication of the merits." (App. 10a.) In so ruling, the Third Circuit departed from the holdings of three other federal courts of appeal that have considered the issue.

Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1120 (9th Cir. 2002), expressly rejected the argument that there are "reduced [personal] jurisdictional requirements over a defendant in suits to confirm [international] arbitral awards." The Ninth Circuit applied the standard of *International Shoe Co.*, 326 U.S. 310, and its progeny, noting that "constitutional due process is satisfied when a non-

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[8] *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002); *Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002); *see also Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985); *Italtrade Int'l USA, LLC v. Sri Lanka Cement Corp.*, No. Civ. A. 00-2458, 2002 WL 59399, at *2 (E.D. La. Jan. 15, 2002); *CME Media Enters. v. Zelezny*, No. 01 Civ. 1733, 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001); *cf. Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 206-07 (2d Cir. 2003) (acknowledging consensus but remanding for jurisdictional discovery); *accord* Restatement (Third) of Foreign Relations Law of the United States § 487 cmt. c (1987) ("As with respect to judgments . . . , an action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property."). *But see TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) (noting in dicta that "although courts often assume the minimum contacts test applies in suits against foreign 'persons,' that assumption appears never to have been challenged").

resident defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Glencore Grain Rotterdam*, 284 F.3d at 1123 (quotation marks and brackets omitted). Because the *International Shoe* standards could not be satisfied as to the defendant, an Indian rice exporter, and none of that exporter's assets had been identified in the forum state, the Ninth Circuit affirmed dismissal of a petition to confirm a foreign arbitral award against the exporter.

Similarly, in *Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002), the Fourth Circuit was asked to confirm an arbitral award rendered in Moscow against a Russian aluminum manufacturer. The court specifically ruled that, in actions to confirm international arbitration awards, "the [New York] Convention . . . does not confer personal jurisdiction when it would not otherwise exist." *Id.* at 212. Applying the standards set forth in *International Shoe* and its progeny and in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the court held that "a general public policy interest in encouraging and enforcing arbitration agreements . . . is not paramount to the interests protected by the Due Process Clause." *Id.* at 215.

And in *Creighton Ltd. v. Qatar*, 181 F.3d 118 (D.C. Cir. 1999), a Cayman Islands corporation based in Tennessee filed suit in Washington, D.C. to confirm an arbitral award entered in Paris against the government of Qatar. In holding that it lacked personal jurisdiction to confirm the award, the D.C. Circuit rejected the argument that Qatar had invited personal jurisdiction in a U.S. confirmation action by entering into an international arbitration agreement with a U.S.-based company. The court observed that "an agreement to . . . arbitrate in a particular jurisdiction is applicable only within that jurisdiction." 181 F.3d at 126 (citation omitted). Applying the standards of *International Shoe*, the D.C. Circuit then

proceeded to reject as a basis for personal jurisdiction the same factors accepted by the Third Circuit in this case, holding that entering into an agreement to arbitrate a dispute with a U.S.-based company in a third country does not reflect any "reasonable anticipation" of being sued in a U.S. action to enforce an arbitral award:

> "Creighton claims that Qatar has the requisite minimum contacts mainly because Qatar entered into a contract with a company based in the United States. Because that contract provided for ICC arbitration of all disputes and (according to Creighton) Qatari law does not recognize or enforce arbitral awards, 'it was certainly foreseeable that Creighton would seek to enforce any award in its favor . . . in the United States.' In addition Creighton asserts that Qatar contacted Creighton in Tennessee during the negotiations leading to the contract in order to clarify an apparent error in Creighton's bid, Creighton signed a modification to the contract in Tennessee, and during construction Qatar telexed weekly status reports to Creighton's offices in Tennessee.
>
> These contacts, however, do not demonstrate that Qatar purposefully availed itself of the laws of the United States and hence should reasonably have anticipated the risk of being haled into court here." 181 F.3d at 127.

The Third Circuit reached the opposite conclusion in this case:

> "[T]he desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether Telkom 'reasonably anticipate(d) being haled into' a New Jersey court. *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Moreover, the fact that the arbitration at issue was between a New Jersey corporation and

> the former government-owned state telecommunications monopoly illustrates New Jersey's interest in adjudicating this dispute." (App. 10a.)

The Third Circuit, in sum, regarded the "portability of [international] arbitration awards" as a key factor in deciding that Telkom could reasonably be required to defend itself in the United States. Its analysis squarely conflicts with the Ninth, Fourth, and D.C. Circuit holdings that actions to enforce international arbitration awards against foreign persons do not warrant any relaxation of the "minimum contacts" standard on which personal jurisdiction depends. Furthermore, as we show in the next section, the Third Circuit's analysis of "minimum contacts" was seriously flawed in other respects.

The conflict between the Third Circuit's ruling and the decisions of the three other circuits frames an important issue. Foreign businesses such as Telkom will be understandably reluctant to enter into contracts with U.S.-based suppliers if they face the risk of having to defend themselves in the U.S. even though their contract calls for performance and arbitration outside the U.S. under a different nation's laws. In departing from the holdings of three other federal courts of appeal, the Third Circuit failed to engage in the careful analysis mandated by *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), that "great care and reserve" must be exercised before requiring a non-resident foreign person to defend itself in the United States. Although this Court was evenly split over whether Asahi Metal had the "minimum contacts" with California required to satisfy due process, eight justices agreed that the exercise of personal jurisdiction over Asahi Metal "would offend traditional notions of fair play and substantial justice":

> "The unique burdens placed upon one who must defend oneself in a foreign legal system should

have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Id.* at 115.

The potential impact of the Third Circuit's ruling on the willingness of foreign persons to contract and arbitrate disputes with U.S. suppliers, and related issues of fairness, should be weighed in light of the fact that arbitration clauses are now the rule rather than the exception in international commercial contracts. *See* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 Am. J. Comp. L. 233, 233 n.1 (Fall 2006) (estimating that 90% of international contracts contain an arbitration clause). The number of international arbitrations has also increased sharply in recent years.[9] The Third Circuit's decision creates uncertainty over whether foreign buyers who agree to arbitrate disputes with U.S. suppliers thereby subject themselves to broadened assertions of personal jurisdiction by U.S. courts.

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[9] Drahozal observes that "between 1993 and 2003, the number of international arbitration proceedings administered by leading institutions almost doubled." *Id.* at 233. The American Arbitration Association's international arbitration caseload "more than tripled," during that time. The International Chamber of Commerce has also seen participation by U.S. parties (as both claimants and respondents) increase drastically in the past two-and-a-half decades. *Id.* In every year between 1998 and 2004, more U.S. entities participated in ICC arbitrations than entities of any other nationality, and U.S. persons now constitute approximately 12% of all parties to ICC arbitrations. *Id.* at 244.

B. Review Is Warranted To Correct The Erroneous "Third Circuit Case Law" Standard For Determining Personal Jurisdiction Issues.

The Third Circuit also disregarded the principles of *Asahi Metal* and other decisions of this Court when it rejected the conclusions of the two district courts that it would be unfair and unreasonable to exercise personal jurisdiction over Telkom. The Third Circuit explained that the district courts had erroneously viewed personal jurisdiction issues "through the lens of D.C. Circuit law" rather than "through the lens of Third Circuit law." (App. 9a.) This rationale ignores, of course, that D.C. Circuit and Third Circuit standards should not differ because "[t]here is, after all, only one Due Process Clause in the Fourteenth Amendment." *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986).

It is the Third Circuit standard, not the D.C. Circuit standard, that plainly departs from the principles stated in this Court's personal jurisdiction decisions. The facts found by both district courts established that all material aspects of the negotiation and performance of the Integrated Agreement took place in South Africa. Telkom issued its RFB in South Africa; all negotiations occurred there; the IA was signed there; Telkom opened an office there from which it was required under the IA to perform the contract; South African law governed; arbitration was to be held there; the parties agreed to the jurisdiction of the South African courts; the key Telcordia personnel relocated to South Africa; all deliveries were made there; and Telcordia rendered its invoices there. (App. 19a, 25a; App. 32a, 36a-37a.)

Under these undisputed facts, both district courts concluded that there was no basis for finding that Telkom "purposefully avail[ed] itself of the privilege of conducting activities within the forum state, thus invoking the

benefits and protections of its laws." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). (App. 24a; App. 35a-38a.) In addition, each court concluded that it would not "comport with fair play and substantial justice" to require Telkom to defend itself in the U.S. even if Telkom could be deemed to have contacts with the United States. *Id.* at 476 (citation and quotation marks omitted). (App. 28a; App. 37a).

Sweeping aside the undisputed factual findings, the court below held that special Third Circuit standard warranted the exercise of personal jurisdiction because Telkom (a) had purchased "customized merchandise" from a New Jersey company, (b) had sent its employees to New Jersey — at Telcordia's request — to address urgent software problems, and (c) did not wire money to Telcordia's New Jersey bank after disputes arose. Following this Court's decisions, each of the district courts regarded these same supposed "contacts" with New Jersey as incidental reflections of Telcordia's choice of New Jersey as a headquarters, and not as any act of "purposeful availment" by Telkom of the privileges and protections of New Jersey law. (App. 26a-27a; App. 36a-37a.)

In rejecting what it called D.C. Circuit law, the Third Circuit plainly intended to apply a due process standard quite different from that applied in the otherwise strikingly similar *Creighton* case. The D.C. Circuit held that Qatar's incidental contacts with the United States arising out of a contract negotiated and performed in Qatar (and arbitrated in Paris) could not reasonably be a basis for finding "purposeful availment" and for exercising personal jurisdiction over the foreign buyer. As the D.C. Circuit explained, a "purchaser who selects an out-of-state seller's goods or services based on their economic merit does not thereby purposefully avail itself of the seller's state law, and does not merely by purchasing from the seller submit to the laws of the

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-1653

TELCORDIA TECH INC., IN THE MATTER OF THE ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN,

Appellant,

v.

TELKOM SA LTD.

Filed: August 14, 2006

Before SCIRICA*, FUENTES and ROTH**, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

We review here two orders by the District Court of New Jersey. In the first, the District Court granted Telkom SA Ltd.'s motion to dismiss Telcordia Technologies Inc.'s petition to confirm a partial arbitral award. Specifically, the District Court dismissed

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*This case was argued before the panel of Judges Fuentes, Roth and Rosenn. As Judge Rosenn passed away on February 7, 2006, Judge Scirica has been added to the coram.

**Judge Roth assumed senior status on May 31, 2006.

Telcordia's petition with prejudice because of issue preclusion or estoppel resulting from a previous decision by the D.C. Circuit Court of Appeals dismissing a similar petition by Telcordia without prejudice. In the alternative, but still in the first order, the District Court dismissed the petition without prejudice because the court chose to exercise "its discretion not to enforce the award at this time."

In the second order, the District Court dismissed the petition for lack of personal jurisdiction over Telkom and denied Telcordia's request for jurisdictional discovery. For the reasons that follow, we find that the District Court does have personal jurisdiction over Telkom. Furthermore, we find that considerations of comity and the proper interpretation of the New York Convention dictate that the petition be dismissed without prejudice.

I. Background

Telcordia, with a principal place of business in Piscataway, New Jersey, entered into a multimillion dollar contract with Telkom, a South African telecommunications company that was formerly the state-owned telephone monopoly.[1] Pursuant to the agreement, Telkom was to pay Telcordia more than $249 million for customized telecommunications software. Unfortunately, the performance of the contract was racked with disputes, mainly with respect to whether the software complied with certain contractual specifications.[2]

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[1] Telkom was privatized in 2004 and currently operates as an ordinary commercial company under South African law with the government as a shareholder.

[2] For reasons that will become clear, the substance of the underlying contractual dispute is not particularly important for purposes of this appeal. As such, the underlying dispute will be referred to only in passing.

Pursuant to the parties' contract, the two companies entered into binding arbitration in South Africa according to the rules of the International Chamber of Commerce (ICC). The arbitrator was Anthony Boswood, QC, of Fountain Court Temple, London, England. During the proceedings, Telkom sought intervention from the South African High Court to correct alleged errors in the arbitration.[3] Specifically, Telkom concluded that the arbitrator was viewing issues from the perspective of English law, instead of South African law, as required by the parties' agreement. Before the High Court could act, on September 27, 2002, the arbitrator held that Telkom was liable to Telcordia for breach of contract. On September 30, 2002, the ICC's International Court of Arbitration formally issued its final award in favor of Telcordia and directed the parties to give it effect.

Shortly thereafter, Telcordia petitioned the United States District Court for the District of Columbia to confirm the arbitral award pursuant to the New York Convention.[4] Contemporaneously, Telkom had filed a

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[3] The South African High Court is a trial court.

[4] At the time Telcordia brought the petition, the Government of South Africa was the majority owner of Telkom. Consequently, venue is permitted in, but not limited to, the District of Columbia pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1391(f), which states that:

> A civil action against a foreign state as defined in section 1603(a) of this title [28 USCS § 1603(a)] may be brought-
>
> (1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;
>
> (2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title [28 USCS § 1605(b)];

(...continued)

separate action in the South African High Court to have the award set aside or annulled pursuant to Section 33 of the South African Arbitration Act. Article III of the New York Convention provides that each state party "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon." The setting aside or annulment of the arbitral award by the South African Court would be grounds for other courts to refuse recognition and enforcement of the arbitral award pursuant to Article V of the New York Convention. Specifically, Article V(1)(e) provides that:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
>
> (e) The award has not yet become binding on the parties, or has been set aside or
>
> suspended by a competent authority of the country in which, or under the law of which, that award was made.

In July 2003, the D.C. District Court dismissed the case without prejudice on the grounds that it lacked

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(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title [28 USCS § 1603(b)]; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(brackets in original)

personal jurisdiction over Telkom and, alternatively, that the case could not proceed under the doctrine of *forum non conveniens*. Telcordia appealed to the U.S. Court of Appeals for the D.C. Circuit. That court affirmed on the alternative ground that under Article VI of the New York Convention the District Court should have adjourned its proceeding and awaited the outcome of the pending action in South Africa.[5] Article VI provides a mechanism by which courts asked to enforce an arbitral award can adjourn to await the type of proceeding in the situs jurisdiction referenced in Article (V)(1)(e). Accordingly, the D.C. Circuit dismissed the petition without prejudice.

On November 27, 2003, and while the case was on appeal in the D.C. Circuit, the South African High Court issued a decision setting aside the award and ordering a new arbitration. On November 29, 2004, the Supreme Court of Appeal of South Africa agreed to hear Telcordia's appeal from the trial court's annulment of the award. This appeal is currently pending.

Undeterred, Telcordia brought a petition to enforce the arbitral award in the District of New Jersey. The District Court dismissed the petition with prejudice based on estoppel vis-à-vis the D.C. Circuit decision and, alternatively and cryptically, dismissed without prejudice pursuant to the New York Convention. In a second order, the District Court dismissed for lack of personal jurisdiction over Telkom. Telcordia timely appealed both orders to this Court.

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[5] Both the United States and South Africa are signatories to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is also know as the New York Convention.

II. Subject Matter Jurisdiction and Standard of Review

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because Telcordia sought confirmation of an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), 9 U.S.C. § § 203, *et seq.* This Court has appellate jurisdiction over the two final orders under 28 U.S.C. § 1291.

We review a district court's decision that it possesses or lacks personal jurisdiction *de novo. Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir.2002). In reviewing a motion to dismiss for lack of personal jurisdiction, this Court "must accept all of the plaintiff's allegations as true and construe disputed facts in favor of the plaintiff." *Id.* (quoting *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 142 n. 1 (3d Cir.1992)). Factual findings made by a district court in determining personal jurisdiction, however, are reviewed for clear error. *Pennzoil Prod. Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 200 (3d Cir.1998). Review of a district court's dismissal on grounds of issue preclusion is plenary. *Del. River Port Auth. v. Fraternal Order of Police*, 290 F.3d 567, 572 n. 6 (3d Cir. 2002) (marshaling authority).

The standard of review of a district court's decision to defer to foreign annulment proceedings under Article VI of the New York Convention is one of first impression for this Circuit. We agree with the Second Circuit that "in light of the permissive language of Article VI of the Convention and a district court's general discretion in managing its own caseload and suspense docket, ... the proper standard for reviewing a district court's decision whether to adjourn is for abuse of discretion." *Europcar Italia S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 316-17 (2d Cir. 1998) (internal citations omitted).

III. Discussion

A. PERSONAL JURISDICTION

The District Court of New Jersey may assert personal jurisdiction over Telkom to the extent provided under New Jersey law. *See Carteret,* 954 F.2d at 144 (quoting *Provident Nat'l Bank v. California Fed. Sav. & Loan Ass'n,* 819 F.2d 434, 436 (3d Cir. 1987)). New Jersey's long-arm statute provides for jurisdiction up to the limits of the protection afforded to nonresidents by the Due Process Clause of the Fourteenth Amendment. *Charles Gendler & Co., Inc. v. Telecom Equip. Corp.,* 102 N.J. 460, 508 A.2d 1127, 1131 (1986). Pursuant to the Due Process Clause of the Fourteenth Amendment, *in personam* jurisdiction may be asserted over a nonresident so long as the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945) (quotation omitted).

The concept of minimum contacts varies according to the nature of the interactions and type of jurisdiction asserted. Specific jurisdiction[6]is established when a nonresident defendant has "purposefully directed" his activities at a resident of the forum and the injury arises from, or is related to, those activities. *General Elec. Comp. v. Deutz AG,* 270 F.3d 144, 150 (3d Cir. 2001). In determining jurisdiction for a breach of contract, the district court must consider the totality of the

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[6] Since we find that the District Court can exercise specific jurisdiction over Telkom relating to the contract at issue, we need not reach the issue of general jurisdiction.

circumstances. *Remick v. Manfredy,* 238 F.3d 248, 256 (3d Cir. 2001).

Traveling to the forum to consult with the other party can constitute purposeful availment, regardless of who solicited the contact. *Carteret,* 954 F.2d at 150. Moreover, physical presence in the forum is no longer determinative in light of modern commercial business arrangements; rather, mail and wire communications can constitute purposeful contacts when sent into the forum. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985). Also, where a long-term relationship has been established, actual territorial presence becomes less determinative. *General Elec.,* 270 F.3d at 151. Finally, "[i]n contract cases, courts should inquire whether the defendant's contacts with the forum were instrumental in either the formation of the contract *or its breach.*" *Id.* at 150 (emphasis added).Telcordia alleges that Telkom has the following contacts with New Jersey:

> (1) Telkom entered into a long-term, quarter-billion dollar contract with a New Jersey company;
>
> (2) significant activities related to the contract were performed in New Jersey;
>
> (3) Telkom visited New Jersey on numerous occasions in connection with the contract;
>
> (4) Telkom communicated with Telcordia's New Jersey office extensively;
>
> (5) Telkom paid Telcordia via a New Jersey bank
>
> (6) Telkom breached the contract by failing to make payments to said New Jersey bank.

The District Court rejected these proffered contacts on the grounds that they constituted "isolated visits to New Jersey [that] were merely incidental to the performance of the contract and, in any event, were not

occasioned by Telkom's purposeful availment of the privileges of conducting activities in the United States." Also, the District Court relied heavily on the findings of the D.C. District Court, although it did recognize that the findings were not preclusive in light of the D.C. Circuit Court of Appeals's limited holding.

In this regard, the District Court was in error.[7] The D.C. District Court's analysis, which applied D.C. Circuit law, is not determinative in light of Third Circuit case law interpreting the Due Process Clause. Moreover, Telcordia offered additional facts in its current petition linking Telkom to New Jersey that were not analyzed by the D.C. District Court. Finally, the D.C. District Court's analysis did not examine the specific contacts between Telkom and New Jersey viewed through the lens of Third Circuit law; rather, the Court focused broadly on the contacts between Telkom and the United States viewed through the lens of D.C. Circuit law. As such, the persuasive influence of the D.C. District Court's analysis is limited.

In regard to Telkom's contacts with New Jersey, it is undisputed that Telkom and Telcordia entered into a relationship to exchange customized merchandise. Put another way, their contract did not constitute the isolated interaction of a supplier putting an item into the stream of commerce to be fished out by a consumer. As such, Telkom's lack of a physical presence in New Jersey becomes less determinative. *General Elec.*, 270 F.3d at 151.

It is also undisputed that Telkom representatives traveled into New Jersey pursuant to the business

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[7] The District Court's determinations did not contain factual findings; rather, the determination focused on the legal import of undisputed events and facts. As such, they are reviewed *de novo*. *Pinker*, 292 F.3d at 368.

relationship. For example, representatives visited New Jersey to participate in testing-related matters once problems arose in the contract. Such consultations, when they constitute a significant part of the business relationship, represent purposeful availment. *See Carteret,* 954 F.2d at 150. Given the specific nature of the requested goods, the close relationship and resulting consultations were a significant part of the business arrangement. Moreover, the breach of contract, *i.e.*, the failure to pay for contractually compliant software, occurred when the payment was not placed in a New Jersey bank pursuant to the parties' course of dealings. Also, the fact that the contract called for the establishment of an office in South Afri is not determinative. *Strick Corp. v. A.J.F. Warehouse Distribs., Inc.,* 532 F.Supp. 951, 960 (E.D.Pa. 1982) (noting that "[i]t is not necessary that a suit be brought where the defendant has the most contacts or even in the most logical forum.").

Finally, the fact that the proceeding was for the enforcement of an arbitral award, rather than adjudication on the merits, rightly colors our analysis. Although the New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien, the desire to have portability of arbitral awards prevalent in the Convention influences the answer as to whether Telkom "reasonably anticipate(d) being haled into" a New Jersey court. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). Moreover, the fact that the arbitration at issue was between a New Jersey corporation and the former government-owned state telecommunications monopoly illustrates New Jersey's interest in adjudicating this dispute. *Id.* at 292 (noting that "[i]mplicit in this emphasis on reasonableness [of assuming jurisdiction] is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other

relevant factors, including the forum State's interest in adjudicating the dispute"). Thus, the totality of the circumstances points toward sufficient contacts by Telkom with New Jersey. As such, the District Court has jurisdiction to enforce the arbitral award.

B. ISSUE PRECLUSION

In its order dated January 24, 2005, the District Court dismissed with prejudice Telcordia's petition based on the D.C. Circuit's decision. Specifically, the District Court held that:

> Telcordia's Petition is dismissed with prejudice because principles of issue preclusion or estoppel do not permit it to relitigate the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in *Telcordia Technologies, Inc. v. Telkom SA, Limited* (No. 03-7099, issued on April 9, 2004), which upheld the dismissal of Telcordia's petition to confirm the same arbitration award pursuant to Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*see* 9 U.S.C. §§ 201, *et seq.*) (the "Convention"). In so ruling, this Court does not reach the merits of the parties' underlying dispute.

The D.C. Circuit's decision, however, was that the proceeding should be adjourned pursuant to Article VI of the New York Convention. More concretely, the D.C. Circuit affirmed the District Court's dismissal of the petition without prejudice.

For Telkom to be able to piggyback a dismissal without prejudice into a dismissal with prejudice is anathema to the "wait-and-see" raison d'être of Article VI. Although we agree with Telkom that the decision is still pending in South Africa, given the fact that the case is currently working its way through South Africa's appeals process, the fact that Telcordia prematurely brought a

case for enforcement in New Jersey should not predetermine its ability to ever bring a case in New Jersey, as would be the case if the dismissal was on the merits.[8]

Put another way, this case would be very different if, for example, the D.C. Circuit had ruled pursuant to Article V and refused to enforce the award. Such a decision would likely constitute a decision on the merits entitled to preclusive import. That is not the case here. The D.C. Circuit opinion relied on Article VI rather than Article V.

Telkom's allegations of forum-shopping by Telcordia do not change the analysis. First, the D.C. Circuit did not mention a desire to maintain any type of control over the proceeding, as would be the case if it decided to "adjourn" by issuing a stay-a possibility under Article VI that was recognized by the D.C. Circuit yet not exercised. *Telcordia Technologies, Inc. v. Telkom SA, Limited* (No. 03-7099, issued on April 9, 2004) (noting that "we construe 'adjourn' to mean stay or dismiss without prejudice, we affirm the district court on the ground that the court's dismissal was proper under Article VI"). As such, the filing of the petition in New Jersey does not take

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[8] This Court's decision in *Pastewka v. Texaco Inc.*, 565 F.2d 851 (3d Cir.1977), which Telkom argues is controlling, is inapposite to the instant case. In *Pastewka,* the District Court for the Southern District of New York had dismissed plaintiffs' suits on *forum non conveniens* grounds in favor of adjudication in England. When the plaintiffs tried to bring the same suits in Delaware and were unable to point to any "objective fact establishing that, unlike New York, Delaware would be a more convenient forum than England" this Court dismissed the complaints. Unlike here, the plaintiffs in *Pastewka,* were precluded from bringing their suit in New York. Here, it is undisputed that Telcordia could rebring the petition in the D.C. District Court once a set of events have passed.

the case out of the control of another court and, therefore, does not constitute a type of forum-shopping that would justify remediation by this Court.

Second, to prohibit Telcordia from bringing a claim based solely on allegations of forum-shopping ignores the maxim that courts generally defer to a plaintiff's choice of forum. *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 880 (3d Cir. 1995). As such, the District Court's dismissal with prejudice is reversed.

C. ARTICLE VI OF THE NEW YORK CONVENTION

As previously mentioned, the District Court dismissed the petition without prejudice, as an alternative holding, because the Court chose to exercise "its discretion not to enforce the award at this time." In reaching this decision, the District Court found that;

> The High Court issued a decision setting aside the partial award, and Telcordia has persuaded the Supreme Court of appeals of South Africa to review that decision. Literally under article 6 the decision has been set aside, the decision of the arbitrator has been set aside by the High Court of South Africa which is, I find, a competent authority of the country in which or under the law of which that award was made. I don't think there is any dispute about that.
>
> Until the Supreme Court of Appeal rules, the decision of the arbitrator remains set aside, and therefore, both under article 6 which I have just referred to, and article 5(1)(e) the Court would have the authority to refuse to recognize or enforce an arbitral award. Or article 5 and article 6 work together in this respect, it seems to me to commonly, under article 6, give the Court discretion to refuse to enforce at this time, but under article 5 suggest that at this time the

> grounds for refusing to recognize or enforce an arbitral award exist which in turn suggests that at the very least, discretion should be exercised not to enforce it at this time.

We feel that the District Court need not have reached the contours of Article V or the interplay between Articles V and VI. Specifically, the District Court need not have reached its ability to refuse or delay the enforcement of an annulled arbitral award under Article V. As such, we interpret the District Court's order as one for adjournment pursuant to Article VI of the New York Convention. Article VI states that;

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

As was the case when Telcordia sought enforcement in the D.C. Circuit, the annulment proceeding is still pending in South Africa–the South African Supreme Court has agreed to hear the case. Although the arbitral award may have been "literally" set aside by the High Court, the fact that an appeal is currently outstanding before the South African Supreme Court means that functionally an application for setting aside the award is still pending. As such, the District Court's invocation of Article V(1)(e) is premature.

We note further that the District Court's ultimate decision, dismissal without prejudice, is consistent with this Court's notions of comity in the international arena, *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002), and is the

best way for this Court to give full faith and credit to the decision of the D.C. Circuit Court of Appeals. Consequently, we see no reason to determine the complex interplay between Articles VI and V nor, for that matter, do we choose to disturb the discretionary determination by the District Court.[9]

IV. Conclusion

For the reasons discussed above, the District Court has personal jurisdiction over Telkom. Accordingly, the District Court's order of February 15, 2005, is reversed. As to the judgment entered January 24, 2005, the District Court's decision to dismiss Telcordia's petition without prejudice is affirmed, the decision to dismiss the petition with prejudice, however, is reversed. In the interest of clarity, we note that Telcordia can re-file when the Supreme Court of Appeal of South Africa has issued a judgment in the case. We do not, however, reach the issue of whether we can entertain a new petition pursuant to the New York Convention only if the arbitral award is reinstated by the South African Supreme Court.

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[9] Telcordia argues that the New York Convention allows a court to confirm an arbitral award even if the award has been set aside in the situs country. *See, e.g., Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907 (D.D.C.1996) (enforcing an arbitral award that had been nullified by a court in the situs country); Article V ("Recognition and enforcement of the award may be refused ...") (emphasis added). Again, we see no reason to reach this question in light of the pending action in South Africa.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Civil Action 04-2463 (JCL)

In the matter of the Arbitration of Certain Controversies
Between TELCORDIA TECHNOLOGIES, INC.,
PETITIONER

v.

TELKOM SA, LIMITED,
RESPONDENT.

[Filed: Jan. 31, 2005]

ORDER GRANTING MOTION TO DISMISS THE PETITION TO CONFIRM PARTIAL ARBITRAL AWARD

THIS MATTER having come before the Court on the motion of Respondent Telkom SA, Limited ("Telkom"), pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss petitioner Telcordia Technologies, Inc.'s ("Telcordia") Petition to Confirm Partial Arbitration Award;

The Court having considered the written submissions of the parties, heard oral argument, and having stated the basis of its rulings in open court on December 9, 2004;

IT 15 ON THIS 24th day of January 2005, ORDERED:

1. Telcordia's Petition is dismissed with prejudice because principles of issue preclusion or estoppel do not permit it to Mitigate the judgment of the U.S. Court of Appeals for the District of Columbia Circuit in *Telcordia Technologies, Inc. v. Telkom SR, Limited* (No. 037099, issued on April 9, 2004), which upheld the dismissal of Telcordia's petition to confirm the same arbitration award pursuant to Article VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards *(see* 9 U.S.C. §§ 201, *et seq.)* (the 'Convention'). In so ruling, this Court does not reach the merits of the parties' underlying dispute.

2. In the alternative, and independent of the judgment of the D.C. Circuit, Telcordia's petition is dismissed without prejudice. As a matter of construction of the Convention, and the facts which exist at this time, the Court is exercising its discretion not to enforce the award at this time.

3. The Court reserves its decision on the issue of personal jurisdiction over Telkom and will supplement this Order with a decision on personal jurisdiction.

/s/ John C. Lifland, U.S.D.J.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

Civil Action 04-2463 (JCL)

In the matter of the Arbitration of Certain Controversies
Between TELCORDIA TECHNOLOGIES, INC.,
PETITIONER

v.

TELKOM SA, LIMITED,
RESPONDENT.

[Filed: Feb. 16, 2005]

MEMORANDUM AND ORDER

LIFLAND, District Judge:

Before the Court is the Motion of Respondent Telkom SA Limited ("Telkom") to Dismiss the Petition of Telcordia Technologies, Inc. ("Telcordia") to Confirm a Partial Arbitration Award rendered in South Africa and Compel Further Arbitration. Telcordia is a Delaware corporation with its principal place of business in Piscataway, New Jersey. Telkom is a South African corporation with its principal place of business in Pretoria, South Africa.

On December 8, 2004, this Court heard oral argument and dismissed Telcordia's Petition based on

preclusion and the New York Convention. Reasons for those alternative dispositions are set forth on the record. The Court also expressed doubt as to whether personal jurisdiction may be asserted over Telkom, but reserved decision on that issue. Telcordia has renewed its request for jurisdictional discovery.

Addressed herein is the issue of personal jurisdiction. For the reasons that follow, the Court concludes that personal jurisdiction may not be asserted over Telkom and that jurisdictional discovery is not warranted.

BACKGROUND

Telkom is a telecommunications company that sometimes buys equipment from suppliers outside of South Africa. It does so through public tenders or requests for bids ("RFB"), to which interested suppliers respond. In June 1999, Telkom and Telcordia entered into a contract ("Integrated Agreement" or "IA") after Telcordia outbid 18 other companies. The RFB was issued in South Africa. The IA, which was negotiated in South Africa and signed at Telkom's offices in Pretoria, required Telcordia to supply telecommunications software for use in South Africa.

The IA was a South African contract in many respects. The IA required Telcordia to open a business office in South Africa from which it was to perform the contract. Virtually all of the parties' dealings occurred there. Key Telcordia personnel relocated to South Africa, all deliveries were made in South Africa, and Telcordia rendered its invoices to Telkom in South Africa. Moreover, South African law governs the IA. All disputes are subject to arbitration in South Africa. Both Telkom and Telcordia consented to jurisdiction of the South African courts.

Disputes arose concerning Telcordia's performance under the IA and both parties canceled the agreement in early 2001. The dispute went to arbitration in Johannesburg; the arbitrator (an English barrister) was appointed by the Arbitration Foundation of South Africa.

Evidentiary hearings took place in May 2002 and continued from July 31 to August 1, 2002. Telkom's counsel reportedly believed that the arbitrator was improperly considering important issues from the perspective of English law instead of South African law. Telkom thus invoked the South African Arbitration Act of 1965, which establishes procedures for referring legal questions of a South African arbitration to the High Court of South Africa (the South African trial court).

The arbitrator urged the High Court not to entertain Telkom's Section 20 application for public policy reasons, and on the same day, issued a partial award deciding breach of contract issues against Telkom (even though they involved legal questions tendered to the High Court). Telkom moved in the High Court to set aside the partial award under Section 33 of the South African Arbitration Act, which is a statutory review procedure providing for the "setting aside of [an] award" under specified circumstances. Telkom contended that the arbitrator had "committed gross irregularities in the conduct of the arbitration proceedings," had "not afford[ed] Telkom a fair hearing," refused to convene a promised "further oral hearing" to consider evidence pertinent to the partial award, improperly refused to allow the High Court to rule on the Section 20 application, made "grossly incorrect" findings that manifestly disregarded the facts and law, ignored relevant evidence, and exceeded his powers under South African law.

On November 27, 2003, the High Court held that the arbitrator had "misconceived the whole nature of the inquiry [presented to him by the parties' dispute] and his

duties in connection therewith," thereby committing "gross irregularities which have prevented a fair trial of the issues." As a result, the High Court set aside the partial award and named new arbitrators. The High Court denied Telcordia's request for leave to appeal to the Supreme Court of Appeal South Africa on May 3, 2004, and Telcordia then petitioned the Supreme Court of Appeal of South Africa.

By letter dated December 1, 2004, Telcordia advised this Court that the Supreme Court of Appeal of South Africa granted it leave to appeal on November 29, 2004. Thus, the matter of the set aside judgment is currently pending before that court.

Ten days after the arbitrator issued his award, Telcordia filed in the United States District Court for the District of Columbia a Petition to Confirm the Arbitral Award. Telkom moved to dismiss the petition on three grounds: (1) lack of personal jurisdiction over Telkom; (2) forum non conveniens; and (3) deference to the pending set-aside proceedings in South Africa under Article VI of the New York Convention, which allows a foreign court asked to enforce the award to adjourn the decision in deference to proceedings in the other jurisdiction's courts concerning the setting aside or suspension of an award. 9 U.S.C. § 201; *see also Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 177-80 (S.D.N.Y. 1990) (discussing reasons why courts asked to enforce foreign arbitral awards routinely grant stays or dismissals under Article VI of New York Convention).

The district court in the District of Columbia dismissed Telcordia's petition. It held that Telkom's contacts with the United States "are insufficient to exercise personal jurisdiction in this case." *In the Matter of the Arbitration of Certain Controversies Between Telcordia Technologies, Inc. and Telkom SA, Limited*, Civ. A. No. 02-1990, at *7 (D.D.C. July 22, 2003). It further held that forum non conveniens warranted dismissal,

noting that "the South African High Court is currently reviewing Telkom's petition to set aside the partial arbitral award that Telcordia seeks to enforce." *Id.* at * 11. Telcordia appealed.

The U.S. Court of Appeals for the D.C. Circuit affirmed on April 9, 2004, stating that it "need not concern [itself] with the application of forum non conveniens ... [or] personal jurisdiction" because "the [district] court's dismissal was proper under Article VI of the New York Convention."[1] *In the Matter of the Arbitration of Certain Controversies Between Telcordia Technologies, Inc. and Telkom SA, Limited,* 03-7099, at *2 (D.C. Cir. Apr. 9, 2004). The court treated the district court's dismissal as without prejudice because the district court did not state otherwise. *Id.*

Telcordia then sought confirmation by this Court of the partial award that was set aside by the South African High Court, whose decision has been granted review by the Supreme Court of Appeal of South Africa.

DISCUSSION

As to personal jurisdiction, Telcordia argues that ample contacts for Telkom exist under either the New

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[1] Article VI of the New York Convention states that "[i]f an application for setting aside or suspension of the award has been made to the competent authority referred to in article V(1)(e), [a court may], if it considers it proper, adjourn the decision on the enforcement of the award. ..." New York Convention, *art. VI*; *see also* 9 U.S.C. § 201. Article V(1)(e) of the New York Convention provides that enforcement of an award "may be refused" if the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." New York Convention, art. V(1)(e); *see also* 9 U.S.C. § 201.

Jersey long-arm Rule or Federal Rule of Civil Procedure 4(k)(2). Telcordia further maintains that "[i]t is simply not credible for Telkom to claim that it had no expectation of answering to the U.S. courts in a confirmation action, were it to lose at the ICC against a U.S. corporation." (Pet. Opp. at 2).

This Court has already ruled on many of the issues presented and argued by the parties, and has dismissed this action on alternate grounds. What remains unresolved is the issue of personal jurisdiction, to which the Court now turns.

Relevant Law

This Court has jurisdiction over parties to the extent provided under New Jersey state law. Fed. R. Civ. P. 4(e); *see also Carteret Sav. Bank F.A. v. Shushan*, 954 F.2d 141, 144 (3d Cir. 1992). New Jersey's long-arm Rule provides for jurisdiction coextensive with the due process requirements of the United States Constitution. N.J. Court Rule 4:4-4(c); *see also Charles Gendler & Co. v. Telecom Equip. Corp.*, 102 N.J. 460, 508 A.2d 1127, 1131 (1986). The Due Process Clause of the Fourteenth Amendment guarantees that in *personam* jurisdiction may only be asserted over a nonresident defendant if that defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotation omitted). Whether personal jurisdiction exists turns on the circumstances of each particular case. *Burger King v. Rudzewicz*, 471 U.S. 462, 485 (1985).

There is personal jurisdiction over a defendant if the defendant has specific or general contacts with the forum. Specific jurisdiction demands that the cause of action be related to or arise out of the defendant's forum-related activities, such that defendant should reasonably

expect to be haled into court there. *Vetrotex Certainteed Corp. v. Consol. Fiber Glass Prod. Co.*, 75 F.3d 147, 151 (3d Cir. 1996); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U. S. 408, 414 n. 8 (1984). In short, the defendant must have "purposefully directed his activities at residents of the forum" and the litigation must have resulted from alleged injuries that "'arise out of or relate[ ] to those activities.'" *BP Chem. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000). General jurisdiction may be asserted if the defendant has "continuous and systematic" contacts with the forum state. *Helicopteros*, 466 U.S. at 414-15.

Alternatively, there may be personal jurisdiction under Federal Rule of Civil Procedure 4(k)(2), which "sanctions personal jurisdiction over foreign defendants for claims arising under federal law when the defendant has sufficient contacts with the nation as a whole to justify imposition of U.S. law but without sufficient contacts to satisfy due process concerns of the long-arm statute of any particular state." Fed. R. Civ. P. 4(k)(2). *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455 n.7 (3d Cir. 2003).

Analysis

This Court concludes that there is no basis to assert personal jurisdiction over Telkom.

Telcordia points to the following contacts with New Jersey:

> "(1) Telkom entered into a long-term, quarter-billion dollar contract with a New Jersey resident whose principal office is in this state; (2) that contract required Telcordia to perform significant activities in New Jersey; (3) Telkom visited New Jersey on numerous occasions in connection with

> this contract; (4) Telkom communicated with Telcordia's New Jersey office extensively; (5) Telkom paid Telcordia in New Jersey through a New Jersey bank; and (6) Telkom breached the contract by failing to make payments totaling more than 100 million dollars to this New Jersey bank."

(Telcordia Op'n at 32).

Telkom responds that it does not do business in the United States and has no property in this country. It further argues that Telcordia's assertions concerning activities in New Jersey related to their contract are not relevant inasmuch as the IA required Telcordia to perform its contract responsibilities from its office in South Africa and that, in any event, any election by Telcordia to partially perform in New Jersey is not purposeful availment by Telkom. Telkom points out that it is not disputed that it issued its RFB from South Africa for software to be installed and used there; the parties' negotiations occurred there; the IA was signed in Pretoria; Telcordia was required to open an office there from which to perform the contract; the IA was governed by South Africa law; any disputes were to be arbitrated there; the parties submitted to the jurisdiction of the South African courts; and the vast majority of the parties' dealings took place in South Africa.

Telkom also points to the D.C. district court's holding that all aspects of the relationship between the parties were tied to South Africa and thus there was no basis for exercising personal jurisdiction over Telkom. The D.C. district court found that:

> "[T]here are no acts by Telkom of purposeful availment of the privileges of conducting business in the United States, or acts pursuant to which Telkom should

> have reasonably anticipated being haled into court here. Indeed, Telkom reasonably expected the opposite-not to be haled into court here-because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa."

In the Matter of the Arbitration of Certain Controversies Between Telcordia Technologies, Inc. and Telkom SA, Limited, Civ. A. No. 02-1990, at *7 (D.D.C. July 22, 2003). The D.C. district court held that Telkom's contacts with the United States, including New Jersey, were insufficient to subject Telkom to personal jurisdiction in the U.S. The jurisdictional analysis undertaken by the D.C. district court is based on the very same contacts and is instructive here, though Telcordia has added, in this court, a declaration to the effect that it performed software testing in New Jersey and that representatives of Telkom visited New Jersey to participate in testing-related matters, DeCort Decl. ¶¶ 4-5. Nonetheless, the facts of the personal jurisdiction analysis are virtually identical.

The parties agree that the D.C. district court's personal jurisdiction findings are not preclusive because on review the D.C. Circuit did not reach the issue of personal jurisdiction. However, the D.C. district court clearly considered it and ruled that there was no basis for exercising jurisdiction. The court concluded that four "incidental" visits to the United States, when evaluated in the context of the parties' entire relationship, did not amount to purposeful availment. Additional visits, Telkom argues, pertain to an unrelated contract and are irrelevant to specific jurisdiction in this instance.

This Court agrees with the findings of the D.C. district court, and is persuaded that this contract and the parties' performance thereof are tied to South Africa in virtually all respects. The Court agrees with the D.C. district court's finding that these isolated visits to New Jersey were merely incidental to the performance of the contract and, in any event, were not occasioned by Telkom's purposeful availment of the privilege of conducting activities in the United States. As to payment arrangements, wire or mail transfers of money directed at the forum are insufficient to confer jurisdiction. *See, e.g., Hydrokinetics, Inc. v. Alaska Mechanical, Inc.*, 700 F.2d 1026, 1031 (5th Cir. 1983); *Asset Allocation and Mgmt. Co. v. Western Employers Ins. Co.*, 892 F.2d 566, 569-70 (7th Cir. 1989); *T.J. Raney & Sons, Inc. v. Security Says. & Loan Ass'n*, 749 F.2d 523, 525 (8th Cir. 1984). In short, the Court finds insufficient contacts with this forum to justify the assertion of personal jurisdiction over Telkom.

Next to be addressed is Telcordia's assertion that Telkom has sufficient nationwide contacts to support the exercise of jurisdiction under Federal Rule of Civil Procedure 4(k)(2). The argument as to nationwide jurisdiction goes that, as an international telecommunications company, Telkom routinely does business with U.S. citizens and companies, and benefits from its relationship with the U.S. and several U.S. entities. (Russell Decl., Exs. 2-18). In addition, Telkom management visits the U.S. periodically for business purposes, including conferences in California and New York City. Telkom has also reportedly entered into a partnership with SBC, a Texas corporation, through which key executives were apparently transferred from SBC to Telkom; launched an initial public offering in March 2003; entered into a Deposit Agreement with the Bank of New York to sell securities in the U.S. and opened a U.S. account to do so; opened an office in Connecticut to "establish a point of presence in the USA to service [Telkom] customers; uses U.S. facilities to route

internet traffic under licensing agreements with U.S. companies; and sent representatives to the U.S. in connection with a separate contract between Telkom and Telcordia. (Rollins Decl. ¶¶ 5, 11; D.C. Cir. Br. at 21-18 (summarizing contracts)).

Telkom responds that, and the D.C. district court found, the IPO and relationship with SBC do not make out "continuous and systematic" contacts with the U.S. given that that standard looks to activities central to the defendant's ordinary business operations. The D.C. district court further found that Telkom's IPO and stock exchange listing do not confer jurisdiction, noting that the case law allows for substantial latitude in foreign entities listing securities on the stock exchanges and prepatory activity in that regard without the risk of subjecting themselves to New York jurisdiction. *See Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000). Likewise, SBC's interest in Telkom and their agreement do not appear to be jurisdictionally significant in that they do not support a continuous and systematic manner of doing business in the United States. As to its business relationship with several U.S. entities, Telkom points out that its sworn declarations attest to the fact that it is not conducting any business in the U.S., Mandla Decl. ¶ 6, and that, not inconsistent with the public information on which Telcordia relies, it merely uses goods and services provided by US-based companies. Thus, these facts do not support the notion that Telkom engages in "continuous and systematic" business in the United States.

Nor does the exercise of personal jurisdiction over Telkom comport with notions of "fair play and substantial justice." The Court agrees with Telkom that it should accord weight to the fact that the parties anchored their contractual relationship to South Africa, expressly consented to the jurisdiction of the South African courts, and agreed that South African law would govern their

agreement. Asserting personal jurisdiction over Telkom would run contrary to the parties' expectations in those respects.

As to Telcordia's request for jurisdictional discovery, the Court is mindful that a plaintiff need not make a substantial showing to obtain jurisdictional discovery. On the other hand, a plaintiff must make a threshold showing of factual allegations that suggest "with reasonable particularity" the existence of contacts sufficient to assert personal jurisdiction. *Toys "R" Us, Inc.*, 318 F.3d at 456 (quoting *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992)). The Third Circuit has instructed that "courts are to assist the plaintiff by allowing jurisdictional discovery unless the plaintiff's claims are 'clearly frivolous.'" Id. (*quoting Mass. School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026, 1042 (3d Cir. 1997)).

But this Court has dismissed the Petition to confirm the partial arbitral award on two alternate bases detailed in the record (and set forth in an Order dated January 24, 2005), in addition to jurisdictional grounds. Accordingly, this case is no longer pending before this Court (or any other United States court) and, under present circumstances, jurisdictional discovery would accomplish nothing and therefore is not warranted or appropriate.

CONCLUSION

This Court concludes that personal jurisdiction may not be asserted over Telkom. The Petition to Confirm the Arbitration Award will be dismissed for lack of personal jurisdiction, as well as for the reasons already set forth on the record, and Telcordia's request for jurisdictional discovery will be denied.

Accordingly, IT IS on this 15th day of February 2005,

ORDERED that the Petition of Telcordia Technologies, Inc. to dismiss the Petition to Confirm the Partial Arbitral Award and Compel Further Arbitration is dismissed for lack of personal jurisdiction over Respondent Telkom SA, Limited; and it is further

ORDERED that the request of Telcordia Technologies, Inc. for jurisdictional discovery is denied.

/s/ John C. Lifland, U.S.D.J.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-1990 (JR)

In the matter of the Arbitration of Certain Controversies Between TELCORDIA TECHNOLOGIES, INC., PETITIONER

and

TELKOM SA, LIMITED, RESPONDENT.

[Filed: July 22, 2003]

MEMORANDUM

Telcordia Technologies, Inc. ("Telcordia"), seeks enforcement of a partial award rendered in arbitration in South Africa of its commercial dispute with Telkom SA, Limited ("Telkom"), a South African company. Telkom moves to dismiss for lack of personal jurisdiction and on *forum non conveniens* grounds. For the reasons stated below, Telkom's motion will be granted.

Background

Telcordia is a technology services company based in New Jersey. Pet. at ¶ 5. Telkom is a corporation organized under the laws of South Africa with its principal place of business in South Africa. Ngcobo Decl. at ¶ 3. The dispute between Telcordia and Telkom

involves an agreement for Telkom to provide and Telcordia to purchase telecommunications software. The South African government owned sixty-seven percent of Telkom's stock shares at the time Telkom entered into the contract with Telcordia. *Id.* at ¶ 4. The contract ("Integrated Agreement") was negotiated in South Africa and was executed there on June 24, 1999. *Id.* at ¶ 9; Castelli Decl. at ¶ 3. It provided that disputes would be submitted to arbitration in South Africa, under the jurisdiction of the South African courts, and that the contract terms were to be interpreted under the laws of South Africa. Integrated Agreement, Ex. A at ¶ 19.1. Telcordia was required to set up a local office in South Africa to perform its responsibilities under the contract, and delivery of the software products was to be made in South Africa. Integrated Agreement at ¶ 10. Telkom was to wire payments due under the contract to Telcordia's bank account in the United States. Integrated Agreement, Ex. B at ¶ 10.3. Telcordia asserts that "much of the work" was performed at its offices in the United States, Castelli Decl. at ¶ 4.[2] During the performance of the contract, Telkom's technical staff visited Telcordia's offices in the United States to learn more about the product that Telcordia was designing for Telkom. Castelli Decl. at ¶ 5; Ngcobo Decl. at ¶ 9.

In early 2001, after disputes arose about Telcordia's performance, both parties exercised their rights to cancel the Integrated Agreement, each claiming a breach by the other. The dispute went to arbitration before the International Chamber of Commerce. A single arbitrator (an English barrister) was appointed. Pursuant to the Integrated Agreement, the arbitration took place in South Africa. In August 2002, while the arbitration was in process, Telkom believed that the arbitrator was

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[2] This is disputed. Ngcobo Decl. at ¶ 10.

applying English contract law rather than South African law and thus, "referred a question" to the High Court of South Africa under Section 20 of the South African Arbitration Act of 1965, which allows such a submission to the High Court during the pendency of arbitration. Telkom also requested a stay of arbitration proceedings until the Section 20 question was resolved by the High Court, but the arbitrator declined that request and, on September 27, 2002, released a partial arbitral award in favor of Telcordia. The partial arbitral award did not assess damages. On November 5, 2002, Telkom petitioned the High Court to set aside the partial arbitral award, asserting that the arbitrator had violated Section 20 and objecting that the partial award had been entered before it had the chance to submit evidence and argument on certain issues. That petition to set aside the partial arbitral award is still pending before the High Court in South Africa. Nonetheless, in this court, Telcordia seeks enforcement of the partial arbitral award.

Analysis

I. Personal jurisdiction

Telkom does not dispute that it is an "agency or instrumentality of a foreign state," as defined by the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1603(b), and that subject matter jurisdiction is proper under the arbitral exception to the FSIA, 28 U.S.C. § 1605(a)(6), but Telkom asserts that the exercise of personal jurisdiction in this case offends the Due Process Clause of the Fifth Amendment because of the insufficiency of minimum contacts with the forum. Telcordia, for its part, insists that the "minimum contacts" analysis is irrelevant, because the Due Process Clause does not apply to foreign instrumentalities, and it asserts that, once subject matter jurisdiction over a claim against a foreign instrumentality has been established under one of the exceptions of the FSIA, personal jurisdiction is automatic. Telcordia also argues that, even

if the "minimum contacts" test applies, Telkom has enough minimum contacts with the United States to justify personal jurisdiction over the foreign respondent.

Subject matter jurisdiction under the FSIA and personal jurisdiction under the Due Process Clause of the Constitution are two distinct inquiries. As the Court of Appeals explained in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982):

> [S]tatutorily, personal jurisdiction exists so long as subject matter jurisdiction exists and service has been properly made under section 1608 of FSIA . . . . However, a statute cannot grant personal jurisdiction where the Constitution forbids it, and the Supreme Court has held repeatedly that certain "minimum contacts" must exist between the person and the jurisdiction to be consistent with the Due Process Clause of the Fifth Amendment.

Id. at 1028. Thus, the court "must undertake a bifurcated analysis, asking first whether a United States court has subject matter jurisdiction, and second whether it can exercise personal jurisdiction over the defendants." *Id.* at 1026. In Telcordia's submission, *Gilson* is no longer good law, because of *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), which held that foreign states cannot invoke the minimum contacts test to contest personal jurisdiction. *Price*, however, was limited to cases involving an "actual foreign government," *id.* at 99; the Court of Appeals expressly declined to decide whether other entities that fall within the FSIA's definition of 'foreign state' -- including corporations -- can be considered persons under the Due Process Clause. *Id.* at 100 (internal citation omitted). Telcordia's argument for extending the holding of *Price* to remove due process protection for any foreign corporation in which a foreign state owns a majority interest is

rejected. The proposition is unsupported by persuasive authority and runs afoul of the well-established precedent that "government instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such." *Dole Food Co. v. Patrickson*, 123 S. Ct. 1655, 1660 (2003)(quoting *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983)).

Due process requires that the defendant "have [had] certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Creighton Ltd. v. Gov't of Qatar*, 181 F.3d 118, 127 (D.C. Cir. 1999)(citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). There must be some purposeful availment of the privilege of conducting activities within the forum state, and the contacts "must be of a quality that [the defendant] 'should reasonably anticipate being haled into court' in the forum." *Id.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). When the claims against a defendant arise from its activities within the forum state, maintenance of the action within the forum state generally does not offend "traditional notions of fair play and substantial justice," because in those circumstances, the defendant ordinarily should reasonably anticipate being haled into court there. *World-Wide Volkswagen*, 444 U.S. at 297. Conversely, when the claims are unrelated to the defendant's activities in the forum, jurisdiction is likely to be improper. *See id.* at 297-98. Regardless of whether Telcordia is asserting specific or general jurisdiction, Telkom's contacts with the forum are insufficient to exercise personal jurisdiction in this case. Telcordia's claims do not arise out of Telkom's actions in the United States, and there are no acts by Telkom of purposeful

availment of the privileges of conducting business in the United States, or acts pursuant to which Telkom should have reasonably anticipated being haled into court here.[3] Indeed, Telkom reasonably expected the opposite -- not to be haled into court here -- because the parties expressly consented to the jurisdiction of the South African courts and agreed that South African law would govern their agreement, and because the contract activities were centered in South Africa.

Except for the fact that payment was to be made by wiring funds to an account in Telcordia's bank in the United States, this case is analogous to *Creighton*, in which the Court of Appeals found that Qatar lacked minimum contacts with the United States notwithstanding Qatar's contract with a U.S.-based company, because the contract was offered, accepted, performed, and allegedly breached in Qatar. *Creighton*, 181 F.3d at 128. Telcordia's contract with Telkom was negotiated, executed, and performed in South Africa, and was subject to the laws of that country. Telkom did not solicit Telcordia's business or secure its services in the United States. Instead, Telcordia won the contract by outbidding other companies. Telkom's assertion that "much of its work" on the contract took place in the United States is not quantified, Castelli Decl. ¶ 4, and that mere assertion does not trump the Integrated Agreement's provision that the place of performance was South Africa. Telcordia agreed to "creat[e] a branch office of Telcordia Technologies, Inc. in the Republic of South Africa in order to perform Telcordia's responsibilities and obligations under this Integrated Agreement," Integrated Agreement at 8, § 10, and Telkom explains that this

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[3] Telkom does not argue that due process requires that it have contacts with the forum state as opposed to the United States in general.

branch office requirement was not merely a formality. The office was a key location for Telcordia employees to perform the work required by the contract. *See* 6/25/03 Tr. at 3. Telcordia did not dispute that proposition in its briefs or in oral argument. The facts of record do not add up to the minimum contacts that would be necessary for personal jurisdiction.

Telkom's four visits to the United States between April and September 2000, Castelli Decl. at ¶ 5, do not amount to purposeful availment. *See Creighton*, 181 F.3d at 128 (recognizing distinction between purposeful availment and contacts that are incidental to the fact that the party providing Case 1:02-cv-01990-JR Document 18 Filed 07/22/2003 Page 8 of 12 (40a) - 9 - the services under the contract happens to be located in the United States). Nor does Telkom's obligation to wire funds to Telcordia's bank account in the United States give rise to personal jurisdiction here: the dispute was not about payments in America but about performance in South Africa. *See, e.g., Federated Rural Elec. Ins. Corp. v. Inland Power & Light Co.*, 18 F.3d 389, 395 (7th Cir. 1994); *Patterson v. Dietze, Inc.*, 764 F.2d 1145, 1147 (5th Cir. 1985). *Cf. Hanil Bank v. PT. Bank Negara Indonesia*, 148 F.3d 127, 134 (2d Cir. 1998)(plaintiff's breach of contract claim arose from defendant's issuance of a letter of credit consenting to make payment wherever plaintiff specified, and thus, defendant's obligation to wire funds to plaintiff's account in New York satisfied minimum contacts test). To exercise jurisdiction based on Telkom's payments to Telcordia's bank account in the United States and on a few visits to the United States that were incidental to the fact that Telcordia is located here would not comport with "traditional notions of fair play and substantial justice," *Int'l Shoe Co.*, 326 U.S. at 316.

Telkom has other contacts here that were unrelated to the contractual dispute. It listed an initial public offering on the New York Stock exchange; it

retained management services from a San-Francisco company; and it contracted briefly with a company in Westport, Connecticut (resulting in a credit report erroneously suggesting the existence of a Telkom office in Connecticut, *see* 6/25/03 Tr. at 10-11). Those contacts unrelated to the dispute between Telcordia and Telkom were not and are not the "systematic and continuous" contacts that are necessary for general personal jurisdiction. *See Helicopteros Nacionalies de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984)(one-time visit to the forum for contract negotiations or personnel training deemed insufficient for general personal jurisdiction); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 97 (2d Cir. 2000)(absent other substantial contacts, a company is not "doing business" in the forum merely by taking ancillary steps in support of its listing on a New York stock exchange); *Recycling Sciences Int'l, Inc. v. Soil Restoration & Recycling, L.L.C.*, 159 F. Supp. 2d 1095, 1102 (N.D. Ill. 2001)(no personal jurisdiction based on one-time sale in the forum unrelated to the cause of action). And if those contacts could somehow be construed as substantial, the exercise of general jurisdiction in a case such as this -- where the parties expressly agreed to be subject to the jurisdiction of another forum and their course of dealing was primarily in that other forum -- would be inconsistent with traditional notions of fair play and substantial justice.

II. *Forum non conveniens*

Telkom's motion to dismiss is also granted on the alternative ground of *forum non conveniens*. Telcordia has not questioned the ability of South African courts to provide an alternative forum to resolve the parties' dispute. In fact, the South African High Court is currently reviewing Telkom's petition to set aside the partial arbitral award that Telcordia seeks to enforce. South Africa is a signatory to the New York Convention, making it possible for Telcordia to seek enforcement of the

arbitral award in South Africa. Telcordia argues that it was foreseeable that it would seek enforcement of the arbitral award in the United States, merely because it is an American company and Telkom agreed to arbitration, but that argument -- which essentially means that Telcordia agreed to South African law and South African courts with its fingers crossed -- is rejected on policy grounds.

Applying the traditional balancing test, it appears that the private interest factors -- relative ease of access to sources of proof, availability of witnesses, and the costs of obtaining witnesses[4] -- are in equipoise, because both parties claim that it is more convenient to litigate in their respective countries. The public interest factors,[5] however, strongly favor South Africa as the forum. The contract was for services to be provided to a company in South Africa for the benefit of South African consumers. The laws of South Africa that govern the contract would be best enforced by the courts of that country. All of these considerations outweigh Telcordia's private interest in seeking enforcement of its arbitral award in the United States.

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[4] *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

[5] *Id.* (public factors include the local interest in resolving local disputes and the problems implicated in the application of foreign law).

Conclusion

For the foregoing reasons, Telcordia's petition to enforce the partial arbitral award will be dismissed. An appropriate order accompanies this memorandum.

JAMES ROBERTSON
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 02-1990 (JR)

In the matter of the Arbitration of Certain Controversies
Between TELCORDIA TECHNOLOGIES, INC.,
PETITIONER

and

TELKOM SA, LIMITED,
RESPONDENT.

[Filed: July 22, 2003]

ORDER

For the reasons set forth in the accompanying memorandum, the respondent's motion to dismiss (#11) is **granted.**

SO ORDERED this 20th day of July 2003.

JAMES ROBERTSON
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03-7099

TELCORDIA TECHNOLOGIES, INC.,
IN THE MATTER OF THE ARBITRATION OF CERTAIN CONTROVERSIES BETWEEN,
APPELLANT

v.

TELKOM, SA, LIMITED,
APPELLEE

[Filed: April 9, 2004]

Before: RANDOLPH, ROGERS, and GARLAND, Circuit Judges.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and the briefs and oral arguments of the parties. After full review of the case, the court is satisfied that appropriate disposition of the appeal does not warrant an opinion. *See* FED. R. APP. P. 36; D.C. CIR. R. 36(b). It is

ORDERED and **ADJUDGED** that the district court's judgment is affirmed. Telcordia appeals the district court's granting of Telkom's motion to dismiss. The court dismissed Telcordia's petition to enforce the

partial arbitral award against Telkom based on *forum non conveniens* and lack of personal jurisdiction. We will presume the district court's dismissal was without prejudice because the district court did not state otherwise. *See Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090-91 (D.C. Cir. 1998).

Telcordia asserts that the district court erred by dismissing the case on *forum non conveniens* because this ground is not specified in Articles V or VI of the "New York Convention." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 53, as implemented by and reprinted in the Federal Arbitration Act, 9 U.S.C. §§ 201-208. Application of *forum non conveniens*, Telcordia argues, also runs counter to the purposes of the New York Convention, which is to allow for the recognition and enforcement of arbitral awards outside of the arbitral forum, here South Africa. New York Convention art. I.

We need not concern ourselves with the application of *forum non conveniens* in this context, nor must we address personal jurisdiction. Article VI of the New York Convention allows a district court to "adjourn" a decision on the enforcement of the arbitral award if "an application for the setting aside or suspension of the award has been made to a competent authority . . .." Telkom made such an application to the High Court of South Africa. (On November 27, 2003, after Telcordia filed this appeal, the High Court issued a decision setting aside the partial award, which Telcordia says it intends to appeal.) Telkom argued in considerable detail to the district court that it should adjourn proceedings under Article VI pending the outcome of Telkom's petition before the High Court. *See* Resp. Telkom's Mot. To Dismiss the Pet., or in the Alternative, to Stay Proceedings at 17-24.

We may affirm a judgment on any ground that is properly raised below, even if the district court did not rely on it. *See Tymshare Inc. v. Covell*, 727 F.2d 1145, 1150 (D.C. Cir. 1984); *LFC Lessors, Inc. v. Pacific Sewer Maint. Corp.*, 739 F.2d 4, 7 (1st Cir. 1984); 5 AM. JUR. 2d *Appellate Review* §§ 828-829 (2003). Because Telkom raised the issue below, and because we construe "adjourn" to mean stay or dismiss without prejudice, we affirm the district court on the ground that the court's dismissal was proper under Article VI of the New York Convention.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate until seven days after the disposition of any timely petition for rehearing or petition for rehearing en banc. *See* FED. R. APP. P. 41(b); D.C. CIR. R. 41(a)(1).

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Deputy Clerk

APPENDIX G

Sections 201 through 208 of Title 9 of the United States Code provide as follows:

Sec. 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

Sec. 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Sec. 203. Jurisdiction; amount in controversy

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or

proceeding, regardless of the amount in controversy.

Sec. 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Sec. 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Sec. 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that

place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Sec. 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Sec. 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

APPENDIX H

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Done at New York, on 10 June 1958

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition

and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and

may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 [2] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [3] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the

ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Notes:

[1] In accordance with Article XII, the Convention came into force on 7 June 1959, the ninetieth day following the date of deposit with the Secretary-General of the United Nations of the third instrument of ratification or accession. The following States have deposited their instruments of ratification or accession (a) on the dates indicated:

Israel . . . . . 5 January 1959
Morocco . . . . . 12 February 1959(a)
United Arab Republic . . . . . 9 March 1959 (a)

[2] League of Nations, *Treaty Series*, Vol. XXVII, p. 157; Vol. XXXI, p. 260; Vol. XXXV, p. 314; Vol. XXXIX, p. 190; Vol. XLV, p. 116; Vol. L, p. 161; Vol. LIX, p. 355; Vol. LXIX, p. 79; Vol. LXXII, p. 452; Vol. LXXXIII, p. 393; Vol. LXXXVIII, p. 312; Vol. XCVI, p. 190; Vol. C, p. 211; Vol. CIV, p. 499; Vol. CVII, p. 470; Vol. CXI, p. 403; Vol. CXVII, p. 55; Vol. CLVI, p. 185; Vol. CLXXXI, p. 356; Vol. CLXXXV, p. 372; Vol. CXCIII, p. 268, and Vol. CC, p. 500; and United Nations, *Treaty Series*, Vol. 117, p. 394; Vol. 261, p. 422, and Vol. 325

[3] League of Nations, *Treaty Series*, Vol. XCII, p. 301; Vol. XCVI, p. 205; Vol. C, p. 259; Vol. CIV, p. 526; Vol. CVII, p. 528; Vol. CXI, p. 414; Vol. CXVII, p. 303; Vol. CXXX, p. 457; Vol. CLVI, p. 210; Vol. CLXXXI, p. 389; Vol. CLXXXV, p. 391, and Vol. CXCIII, p. 269; and United Nations, *Treaty Series*, Vol. 122, p. 346; Vol. 134, p. 402; Vol. 269, p. 384, and Vol. 325

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No. 06-663

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

GRANT L. CLARK
SCIENCE APPLICATIONS INT'L CORP.
10260 Campus Point Drive
San Diego, CA 92121

CHARLES M. LIZZA
KEVIN R.J. SCHROTH
LEBOEUF, LAMB, GREENE & MACRAE LLP
125 West 55th Street
New York, NY 10019-5389

ALLEN B. GREEN
Counsel of Record
DANIEL G. JARCHO
WILLIAM T. O'BRIEN
DANIEL L. RUSSELL JR.
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

JAY G. SAFER
LORD, BISSELL & BROOK LLP
885 Third Avenue, 26th Floor
New York, NY 10022

Counsel for Respondent

QUESTIONS PRESENTED

1. Whether the court below correctly held that respondent's action was not barred by a prior judgment when the facts and legal standards applicable in the prior proceeding were different than in the current action.

2. Whether the court below correctly held that a company with numerous and significant contacts with New Jersey is subject to personal jurisdiction in that State.

RULE 29.6 DISCLOSURE

Telcordia Technologies, Inc. is a non-governmental party. Telcordia is owned by TTI Holding Corporation I, which is owned by Telcordia Holdings, Inc., which is owned equally by Providence Equity Partners Inc. and Warburg Pincus LLC.

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This case does not present any question worthy of this Court's review. In rejecting Telkom's issue preclusion defense, the Third Circuit applied well-settled legal standards, under which the defense fails when (as here) the facts are materially different than they were in a prior proceeding. The estoppel issue is also not worthy of review because the issue no longer has any practical significance. After Telkom filed its Petition for Certiorari, the Supreme Court of Appeal of South Africa affirmed Telcordia's arbitration award—an occurrence that Telkom has repeatedly acknowledged eliminates its estoppel defense.

The Third Circuit's personal jurisdiction ruling similarly applied black letter law to the unique facts of this case, raising no novel or recurring issues for this Court to consider.

Furthermore, this case presents no inter-circuit conflict, because both the Third Circuit's decision and the decisions of other circuits cited by Telkom faithfully follow this Court's longstanding precedents on issue preclusion and personal jurisdiction. Telkom's contention that a conflict exists is based on a mischaracterization of the decision. The text of the Third Circuit's opinion lends no support to Telkom's claim that the court announced new and conflicting rules of law. The Court should deny the Petition for Certiorari.

STATEMENT OF THE CASE

A. Background

This case arises from a contract between Respondent Telcordia Technologies, Inc. (a Delaware corporation with its principal place of business in Piscataway, New Jersey) and Petitioner Telkom S.A. Ltd. (a South African corporation with its principal place of business in Pretoria, South Africa). The contract at issue required Telcordia to develop customized telecommunications software for

Telkom for use in the South African telephone system. (Pet. App. 2a.) Telcordia performed most of the work under the contract in New Jersey, including all software development and testing.

In the contract, the parties agreed to resolve disputes through final and binding arbitration governed by the International Chamber of Commerce ("ICC") Rules. The ICC Rules state that by submitting the dispute to arbitration, the parties agree that the arbitrator's award is binding, that the award will be enforced without delay, and that rights to judicial recourse are waived, insofar as waiver can validly be made. *ICC Rules of Arbitration*, art. 28(6).[1] Under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, such an award can be judicially enforced in any of the 134 countries that are signatories to the Convention (including the United States). In the United States, enforcement proceeds under 9 U.S.C. § 207, which refers to an enforcement proceeding as one to "confirm" the award. Section 207 expressly requires U.S. courts to confirm arbitration awards unless they invoke one of the narrow grounds for refusal of enforcement (set forth in Article V of the New York Convention) or deferral of enforcement (set forth in Article VI of the New York Convention). 9 U.S.C. § 207.

B. The Arbitration

In late 2000, a dispute arose under the contract, and in March 2001, both parties terminated the contract for breach.

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[1] *See* http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf ("Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.").

Telcordia initiated arbitration proceedings and filed a claim for approximately $130 million in damages. Telkom answered and counterclaimed for approximately $350 - $500 million in damages. The Arbitration Foundation of South Africa nominated Anthony Boswood, QC, a highly experienced English barrister, to preside over the arbitration. The ICC confirmed Mr. Boswood's nomination without objection by either party.

The arbitration commenced in Johannesburg in March 2001 and took eighteen months to complete. It included voluminous document productions, interrogatories, requests for admission, two pre-hearing conferences, motions, briefs on key issues, the exchange of twenty-two witness statements, the exchange of written opening statements, and a two-and-one-half week evidentiary hearing.

In August 2002, on the last day of closing arguments, Telkom claimed for the first time that there was a legal issue that required the intervention of a South African court in the arbitration. Telkom then attempted to expand that judicial intervention to encompass all issues placed before the arbitrator. The arbitrator rejected Telkom's eleventh-hour request and declined to refer the matter to the South African court.

On September 27, 2002, the arbitrator issued a sixty-four page award, holding that Telkom was liable to Telcordia for breach of contract. The ICC proceeded to formalize the liability award, pursuant to the parties' agreement that the arbitrator was free to decide any issue by way of partial or interim award. Following standard ICC procedures, the ICC's International Court of Arbitration formally issued a final liability award on September 30, 2002, and directed the parties to give it effect.

Rather than proceeding to the damages phase of the arbitration, however, Telkom launched a local judicial challenge to set aside the award in the South African trial

court. This parallel "set-aside" proceeding is discussed in Section D below.

C. The Proceedings In The District Of Columbia

Shortly after the ICC's International Court of Arbitration issued the final liability award, Telcordia petitioned the U.S. District Court for the District of Columbia to confirm the award, pursuant to 9 U.S.C. § 207 and the New York Convention. Telcordia maintained that the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611, provided for personal jurisdiction and venue in the D.C. District Court.[2] In July 2003, the D.C. District Court dismissed the petition without prejudice on grounds of lack of personal jurisdiction and alternatively under the doctrine of *forum non conveniens*. (*See* Pet. App. 43a.)

On appeal, the U.S. Court of Appeals for the D.C. Circuit refused to reach the district court's grounds for dismissal and affirmed on an alternate ground—that the district court could have properly dismissed the case, without prejudice, under Article VI of the New York Convention. (Pet. App. 43a-44a.) Article VI permits a district court to "adjourn" a decision on the enforcement of an arbitral award if there is a pending parallel judicial proceeding considering whether the award should be set aside. (Pet. App. 51a-52a.) The D.C. Circuit held that the district court could have properly dismissed the case without prejudice under Article VI, because there was a pending set-aside case in the South

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[2] At the time the D.C. action was filed, the Government of South Africa was the majority owner of Telkom. Telcordia maintained that this ownership interest rendered Telkom an instrumentality of a foreign state (*see* 28 U.S.C. § 1603(b)) subject to suit in the D.C. District Court. *See id.* §§ 1391(f)(4), 1603 (providing for venue in D.C. District Court for suit against foreign instrumentality); *id.* §§ 1330(b), 1603 (providing for personal jurisdiction in any district court for Foreign Sovereign Immunities Act claim against foreign instrumentality).

African trial court at the time of the district court's decision, and because Telkom had urged the D.C. District Court to "adjourn proceedings under Article VI pending the outcome" of those proceedings. (Pet. App. 43a-44a.)[3]

D. The South African Trial Court Decision

After the D.C. District Court dismissed Telcordia's petition, and while that dismissal was being appealed to the D.C. Circuit, the South African trial court issued a decision that set aside Telcordia's arbitration award. The decision was based on a wholesale relitigation of the case that took six weeks. In the decision, the South African court voided the ICC award, dismissed the arbitrator, terminated the ICC (which was the parties' contractually agreed-upon, independent governing arbitration body), ordered the parties to conduct an entirely new arbitration before three retired South African judges who had been designated by Telkom, and assessed all costs of the action against Telcordia.

E. The New Jersey District Court Proceeding

Because South African trial court's decision was highly irregular and did not bind the courts of the United States, Telcordia had a right to seek confirmation of its arbitral award in the United States. *See Chromalloy Aeroservices v.*

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[3] Once parallel set-aside proceedings have concluded, the Article VI "adjournment" procedure no longer applies, and the enforcing court proceeds under Article V of the New York Convention to consider confirmation of the award on the merits. (*See* Pet. App. 50a-51a.) By the time of the D.C. Circuit's decision, the South African set-aside proceedings were complete. *See infra* Section D. The D.C. Circuit nonetheless analyzed the case under Article VI, by basing its ruling on the record before the district court at the time of the district court's decision (at which point the set-aside proceedings were still pending). The D.C. Circuit concluded that on that record, it would have been proper for the district court to dismiss without prejudice under Article VI while awaiting the outcome of the parallel South African proceedings.

Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996). Given that the D.C. petition had been dismissed without prejudice, and that no court had previously considered whether Telcordia's award should be confirmed in light of the questionable South African set-aside decision, Telcordia filed a new petition to enforce the award, this time in the U.S. District Court for the District of New Jersey.

The New Jersey forum was chosen because the facts pertaining to personal jurisdiction had changed since Telcordia filed its initial petition in the District of Columbia. In 2004, Telkom had been privatized, and it therefore was no longer considered an "instrumentality" of the Government of South Africa subject to statutory personal jurisdiction under the Foreign Sovereign Immunities Act. Because personal jurisdiction under that Act was no longer possible, Telcordia now had to establish jurisdiction over Telkom in the same manner as any other private company. Accordingly, Telkom's contacts with a specific state—in this case, New Jersey—were now relevant. As the court below explained, "Telcordia offered *additional facts* in its current petition linking Telkom to New Jersey that were *not* analyzed by the D.C. District Court." (Pet. App. 9a (emphasis added).)

The parties' arguments also were entirely different in the New Jersey case than they had been in the D.C. case. In New Jersey, for the first time, the South African trial court decision was placed in the record for review by a United States court. The South African trial court decision was the primary focus of the parties' dispute in the New Jersey District Court. Telcordia argued, for the first time, that the South African decision was evidence of improper bias and "hometown justice"; that the South African court had denied Telcordia fundamental fairness; that the South African decision should not be accorded any deference by a United States court; and that the arbitration award should be confirmed notwithstanding the set-aside decision. Telkom

responded and defended the set-aside decision, arguing that Telcordia could not file a new petition unless and until the South African Supreme Court of Appeal "reinstated" Telcordia's award.

The New Jersey District Court dismissed the petition "with prejudice" on the basis of principles of issue preclusion or estoppel stemming from the D.C. Circuit's "without prejudice" dismissal. (Pet. App. 17a.) In the alternative, in a ruling the Third Circuit later characterized as "cryptic" (*see* Pet. App. 5a), the district court dismissed the petition "without prejudice" based on the New York Convention (Pet. App. 17a). Finally, the district court dismissed the petition for lack of personal jurisdiction. In so doing, the court followed the D.C. District Court's analysis on the issue of personal jurisdiction over Telkom, even though the D.C. District Court had not considered the question whether Telkom (as a private company) was subject to jurisdiction in New Jersey. (Pet. App. 25a-27a.)

F. The Third Circuit's Decision

A unanimous panel of the Third Circuit reversed the district court's order on two issues, but affirmed the dismissal without prejudice. The Third Circuit first held that Telkom is subject to personal jurisdiction in New Jersey based on its numerous and substantial contacts with the State relating to the parties' underlying contract. The Third Circuit's analysis of personal jurisdiction relied on longstanding principles of Due Process and well-established personal jurisdiction case law, including this Court's decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). The court highlighted six significant connections between Telkom and New Jersey. (Pet. App. 8a.) The court also noted that Telkom should have anticipated being haled into New Jersey for an arbitral confirmation proceeding, but it emphasized that "the New York Convention *does not diminish the Due Process constraints* in asserting jurisdiction

over a nonresident alien." (Pet. App. 10a. (emphasis added).)

On the issue of estoppel, the Third Circuit held that the D.C. Circuit's judgment did not bar Telcordia's petition in New Jersey. The court explained that Telkom could not "piggyback a dismissal without prejudice into a dismissal with prejudice." (Pet. App. 11a.)

Although it held that Telcordia's petition was not barred by estoppel, the Third Circuit nonetheless affirmed the district court's dismissal of the petition without prejudice, applying the "wait-and-see" discretion permitted by Article VI of the New York Convention. The Third Circuit applied Article VI on the ground that the South African trial court's set-aside decision had been appealed and therefore had not been resolved with finality. Finally, the Third Circuit noted, in the interest of clarity, that "Telcordia can re-file when the Supreme Court of Appeal of South Africa has issued a judgment in the case." (Pet. App. 15a.)

G. The Decision Of The Supreme Court Of Appeal Of South Africa

On November 22, 2006 (after Telkom filed its Petition for Certiorari in this case), the Supreme Court of Appeal of South Africa ("SCA") reversed the South African trial court's set-aside decision in its entirety, thereby affirming Telcordia's arbitration award. *Telcordia Techs. Inc. v. Telkom SA* [2006] 139 SCA (RSA) (Opp'n App. 1a-85a). In a decision joined by all five justices on the panel, South Africa's highest appellate court characterized the South African trial court's actions as "a judicial snipe hunt." (Opp'n App. 49a ¶ 94.) The SCA wholly rejected Telkom's contentions that the arbitration was marred by "gross irregularities," or that the arbitrator had somehow misconceived or improperly carried out his duties. (Opp'n App. 50a ¶ 97 ("How it can be said, in these circumstances, that the arbitrator had committed a gross irregularity is

incomprehensible."); Opp'n App. 51a-52a ¶ 99 ("If one considers the length of the proceedings, the arbitrator's active involvement in defining and refining the issues, and the detailed and reasoned award, it was as presumptuous as it was fallacious for the court to have held that the arbitrator did not apply his mind properly to the issues at hand.").) Moreover, even though the basis of the set-aside decision was that the arbitrator had "misconceived the nature of the inquiry," the SCA held that there was "*nothing* to justify the conclusion that the arbitrator misconceived the nature of the inquiry" (Opp'n App. 63a-64a ¶ 129 (emphasis added)), and that "[i]t was not the arbitrator who misconceived the issue; it was, with respect, the court" (Opp'n App. 55a ¶ 108).

Telkom responded to the SCA's decision by initiating a collateral attack on a minor aspect of the decision in a different South African appellate court (the Constitutional Court). But the current state of the law in South Africa is that the trial court's decision is a nullity, and therefore Telcordia's arbitration award is valid and fully enforceable.

REASONS FOR DENYING THE PETITION

I. REVIEW IS NOT WARRANTED BECAUSE THE THIRD CIRCUIT'S ESTOPPEL HOLDING DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS

The Third Circuit's decision is consistent with well-settled principles of law set forth by this Court and the other regional circuit courts. Specifically, the Third Circuit held that Telcordia's New Jersey confirmation action was not precluded by the D.C. Circuit judgment, on a record in which the facts and legal issues before the New Jersey District Court were distinct from those argued before and decided by the D.C. Circuit. The Third Circuit's holding stands for the often-cited and unremarkable proposition that issue preclusion is inapplicable when the second action involves a *different* issue than the first action. *See, e.g., Comm'r v. Sunnen*, 333 U.S. 591, 599-600 (1948) (holding that issue preclusion "must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged" (emphasis added)).

Because it relies on a well-settled principle of law, the Third Circuit's decision does not conflict with any of the cases cited in Telkom's petition. All of those cases explain that issue preclusion applies only when the second action involves an issue that is *identical* to the first action. All of the cases cited by Telkom also explain that issue preclusion does not apply when the precise issue presented in the second action was not litigated in the previous action.

Furthermore, Telkom's attempt to assert a circuit conflict is based on a misreading of the Third Circuit's holding. Telkom ignores the bulk of the Third Circuit's substantive

analysis of estoppel, and instead relies on selective quotations taken out of context in arguing that the Third Circuit crafted a "new rule" that non-merits rulings lack preclusive effect. No reasonable interpretation of the Third Circuit's decision supports Telkom's strained reading. In fact, the Third Circuit cited with approval case law that directly contradicts the proposition that non-merits decisions lack preclusive effect.

A. The Third Circuit Decision Follows The Well-Established Rule That A Prior Judgment Has No Preclusive Effect If There Has Been A Change In Material Facts

In accordance with well-established legal principles consistently applied by this Court and the lower courts, the Third Circuit held that Telcordia's New Jersey confirmation action was not barred by issue preclusion stemming from the previous D.C. Circuit judgment. The underlying basis for the Third Circuit's holding—which Telkom completely ignores—was simple: issue preclusion did not bar Telcordia's New Jersey confirmation action because an entirely *different issue* was presented to the New Jersey District Court than that which was argued before and decided by the D.C. Circuit. Under black letter law, the requisite conditions for issue preclusion simply were not present.

1. Estoppel Applies Only When The Facts And Applicable Legal Standards In A Second Action Are Identical

This Court has repeatedly explained that issue preclusion (or collateral estoppel) applies only when several criteria are met, including (1) the prior action involved an "identical" issue and (2) the party against whom estoppel is asserted had a "full and fair opportunity to litigate" the issue in the earlier proceeding. *See, e.g., Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 327 n.5, 332-33 (1979) (explaining that collateral estoppel protects "litigants from the burden of

relitigating an *identical* issue" and applies only when a party "received a full and fair opportunity to litigate" the issue in a prior action (emphasis added and quotations omitted)).

As to the first requirement, this Court has cautioned against the application of estoppel principles when a second action involves an issue that is not "identical in all respects" to the issue in the prior action. *Sunnen*, 333 U.S. at 599-600 (holding that issue preclusion "must be confined to situations where the matter raised in the second suit is *identical in all respects* with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged" (emphasis added)); *see also Montana v. United States*, 440 U.S. 147, 162 (1979) (explaining that "litigation [over] the identical question" is barred by collateral estoppel when "the factual and legal context in which the issues [arose] has not materially altered").

Allen v. McCurry, 449 U.S. 90 (1980), illustrates the second requirement. The Court explained that "one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel *cannot apply* when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case." *Id.* at 95 (emphasis added and quotations omitted); *see also Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) (explaining that "the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard").

2. The Third Circuit Correctly Rejected Issue Preclusion On A Record In Which The Facts And Legal Standards Were Different Than Those Before The D.C. Circuit

In this action, the New Jersey District Court was faced with an entirely different issue than that argued before, and

decided by, the D.C. Circuit. As a result, the Third Circuit applied well-established doctrine and correctly held that Telcordia's petition was not barred by issue preclusion.

The distinct issue presented to the New Jersey District Court was whether to confirm Telcordia's arbitral award in light of the South African trial court's decision setting aside that award. In New Jersey, for the first time, a United States court was able to review the decision of the South African trial court. In New Jersey, for the first time, the parties were given an opportunity to litigate the impact of that decision on Telcordia's right to confirmation under the New York Convention.

Before the New Jersey District Court Telcordia argued—with the support of two internationally renowned experts in arbitration—that the South African set-aside decision was actually evidence *favoring* confirmation of the award by a United States court. Telcordia maintained that the set-aside decision contained evidence of improper bias or "hometown justice"; that the South African decision showed that the local court had denied Telcordia fundamental fairness; that the South African decision should not be accorded any deference by a United States court; and that a United States court could, and should, confirm Telcordia's award notwithstanding the South African trial court decision. In response, Telkom proffered two experts of its own who argued that the decision of the South African trial court was proper, and was entitled to deference.

In sum, all of the parties' arguments in the New Jersey District Court focused on the South African set-aside decision and its import in a United States confirmation action. These same arguments and this identical issue were not and *could not* have been argued or decided in the previous proceedings in the D.C. District Court. When Telcordia filed its confirmation action in the District of Columbia, the issue before the D.C. District Court was

whether to confirm Telcordia's award given that a *pending action* to set aside the award was *ongoing* in South Africa. The parties did not litigate the impact any set-aside decision had on Telcordia's confirmation right for the simple reason that *no set-aside decision existed at that time*.

Furthermore, when the D.C. Circuit reviewed the case on appeal, it did so on the record before the district court at the time it made its decision. The D.C. Circuit held that *on that record*, it would have been proper for the district court to have "adjourned" proceedings under Article VI of the New York Convention—by dismissing without prejudice until the South African court ruled in the parallel proceedings. The D.C. Circuit acknowledged the existence of the set-aside decision (which was issued while the case was on appeal in D.C.), but the D.C. Circuit did not consider the impact of the set-aside decision on Telcordia's right to confirmation because: (1) the decision was not in the record to be reviewed by the D.C. Circuit, and (2) the issue was never briefed or argued by the parties.[4]

Given the obvious differences between the issues in the D.C. proceedings and the issue presented in Telcordia's New Jersey action, the Third Circuit's holding that estoppel did not apply is wholly unremarkable.

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[4] During the oral argument in the D.C. Circuit, counsel did inform the court that the set-aside decision had been issued. Telkom argued (unsuccessfully) in the proceedings below that informing the court about the decision somehow meant that its effects on confirmation were argued before the D.C. Circuit. Telkom's argument was based on transcript snippets taken out of context. Telkom cannot credibly contend that Telcordia had a "full and fair opportunity" to litigate the issue before the D.C. Circuit.

3. The Third Circuit's Decision Is Consistent With Prior Case Law Holding That A Prior Judgment Lacks Preclusive Effect If There Has Been A Change In Material Facts

Because the Third Circuit's decision stands for the uncontroversial proposition that a prior judgment lacks preclusive effect if there is a change in material facts, the decision does not establish any new rule of law. The decision also does not conflict with any of the decisions cited in Telkom's petition. All of those decisions recognized and applied the same legal principles recognized and applied by the Third Circuit.

In every single one of the circuit court decisions cited by Telkom in which issue preclusion barred a subsequent action, the second suit involved *identical* facts and *identical* legal standards as the first suit. All of these decisions also recognize that issue preclusion does not apply where, as here, material facts have changed. *See Deutsch v. Flannery*, 823 F.2d 1361, 1364 (9th Cir. 1987) (explaining that "[t]he present complaint makes *precisely the same* statement of this claim as the previous complaint" (emphasis added)); *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (holding that "[plaintiff] is precluded from relitigating *the very question* which was litigated in the prior action" (emphasis added) (quoting *Restatement of Judgments* § 49 cmt. b (1942))); *Grieve v. Tamerin*, 269 F.3d 149, 153-54 (2d Cir. 2001) (holding party was precluded from asserting the *very same* Hague Convention claim in a second action when in the first action the court had abstained under the *Younger* doctrine); *Duffy & McGovern Accommodation Servs. v. QCI Marine Offshore, Inc.*, 448 F.3d 825, 829-30 (5th Cir. 2006) (holding that "collateral estoppel applies when a previously litigated issue of law or fact was *identical* to the present issue, actually litigated, necessary to a final

judgment, and reviewed under the same standard as the present issue" (emphasis added)); *Shaw v. Merritt-Chapman & Scott Corp.*, 554 F.2d 786, 789 (6th Cir. 1977) (holding that appellants were precluded from bringing suit for third time "citing the *same* jurisdictional basis" as previous actions that had been dismissed for lack of jurisdiction (emphasis added)); *Perry v. Sheahan*, 222 F.3d 309, 318 (7th Cir. 2000) (holding that appellant was precluded from relitigating same standing issue he had raised previously where new factual allegations in complaint "did not represent a change in circumstances"); *Park Lake Res. LLC v. U.S. Dep't of Agriculture*, 378 F.3d 1132, 1137-38 (10th Cir. 2004) (holding issue preclusion barred suit because the "same issue" had been decided in prior action "on the same available facts"); *Kasap v. Folger Nolan Fleming & Douglas, Inc.*, 166 F.3d 1243, 1248 (D.C. Cir. 1999) (dismissing case on basis of issue preclusion where previous suit had been dismissed for insufficient jurisdictional amount because new complaint failed to show any change in circumstances); *Goldsmith v. Mayor & City Council of Baltimore*, 987 F.2d 1064, 1068-69 (4th Cir. 1993) (holding that the court "must determine *precisely* what issues the court decided" in the prior action, and holding that certain claims were not barred because they had not been "previously litigated" (emphasis added)); *United States v. Dean*, 752 F.2d 535, 541 n.14 (11th Cir. 1985) (explaining that a prior decision only has *res judicata* effect "as to issues that were actually decided," and holding there was no estoppel because the court could not determine the exact basis of the prior judgment); *Pohlmann v. Bil-Jax, Inc.*, 176 F.3d 1110, 1112-13 (8th Cir. 1999) (reversing dismissal based on issue preclusion because issue in previous case was "*not* identical" to current issue (emphasis in original)).

B. The Third Circuit Did Not Announce A New Rule That Non-Merits Dismissals Lack Preclusive Effect

Telkom also has no basis for asserting that that the Third Circuit announced a "sweeping" new "general rule"—in conflict with the law of other circuits—that non-merits dismissals lack preclusive effect. (Pet. 10-11.) Telkom invents this alleged new rule out of whole cloth, by misconstruing a single paragraph of the Third Circuit's decision. That paragraph contrasts dismissal of a case, with prejudice, on the merits (under Article V of the New York Convention) with the dismissal of a case without prejudice, under Article VI of the New York Convention, to defer to a parallel foreign proceeding. (Pet. 12-13 (citing Pet. App. 12a).) In this discussion, the Third Circuit makes the unremarkable point that a non-merits dismissal (without prejudice) under Article VI permits further court proceedings at a later time, whereas a merits dismissal under Article V (with prejudice) does not. (Pet. App. 12a.) There can be no serious dispute on this point. The D.C. Circuit and the Third Circuit both agreed that when a court "adjourns" under Article VI, it can either "stay or dismiss without prejudice." (Pet. App. 12a, 44a.) It necessarily follows that when a district court decides that the parallel foreign proceedings are sufficiently complete, the "adjournment" can end, and proceedings before the district court can continue, either through the lifting of a stay or the filing a new case following dismissal without prejudice. That is why the federal statute implementing the New York Convention refers to an Article VI adjournment as a "*deferral* of recognition or enforcement." 9 U.S.C. § 207 (emphasis added). That is also why the Third Circuit described the "raison d'être of Article VI" as "wait-and-see." (Pet. App. 11a.)

By adjourning under Article VI, a court instructs the

parties to "wait-and-see," and then resume proceedings once the parallel foreign proceedings are sufficiently complete. The Third Circuit properly ruled that to hold that an Article VI adjournment *bars* later proceedings—as the New Jersey District Court did—would have the outrageous and untenable effect of converting a dismissal without prejudice into a dismissal with prejudice. (Pet. App. 11a ("For Telkom to be able to piggyback a dismissal without prejudice into a dismissal with prejudice is anathema to the 'wait-and-see' raison d'être of Article VI.").)

The Third Circuit's brief commentary on Article VI described above therefore addresses issue preclusion in a very specific context, in which a non-merits dismissal occurs in U.S. district court, the facts then change (through developments in the foreign parallel proceeding), and the parties later return to U.S. district court for consideration of the changed circumstances. This commentary in no way presents a conflict with the decisions of other circuits, cited by Telkom, in which relitigation of non-merits rulings was precluded because there were *no* changed circumstances. *See supra* Part I.A.3.

Indeed, there can be little doubt that the Third Circuit would find issue preclusion in a different case, if a party tried to relitigate the identical factual and legal issues resolved in a prior non-merits ruling. The Third Circuit cited with approval its earlier decision in *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir. 1977), in which the court held that a non-merits dismissal (on *forum non conveniens* grounds) precluded later relitigation of the same issue on the same facts. (Pet. App. 12a n.8.) However, the Third Circuit distinguished *Pastewka* from the present case, in which the issue is whether new court proceedings can be instituted "once a set of events have passed" in the foreign parallel proceeding. (Pet. App. 12a n.8.) The Third Circuit held that under those circumstances, the new court proceedings are not

precluded, and Telkom cannot point to any conflicting decision from another circuit holding otherwise.

II. REVIEW OF THE ESTOPPEL ISSUE IS NOT WARRANTED BECAUSE THE ISSUE IS NO LONGER PRESENTED BY THIS CASE

The Court also should not grant review of the estoppel issue, because it is an issue no longer presented by this case. The Court should take judicial notice of the (attached) recent decision of the Supreme Court of Appeal of South Africa ("SCA") that was decided after the Petition for Certiorari was filed. (Opp'n App. 1a-85a.) The SCA's decision emphatically affirmed the validity of Telcordia's arbitration award and immediately nullified the set-aside decision of the South African trial court. (Opp'n App. 55a ¶ 108 (reversing trial court decision in its entirety and explaining "[i]t was not the arbitrator who misconceived the issue; it was, with respect, the court").) As a practical matter, the SCA's decision removes the estoppel issue from this case, because Telkom has repeatedly conceded that Telcordia would not be estopped from returning to U.S. district court to enforce an arbitration award deemed valid by the South African courts. This Court should not waste its resources granting review on an estoppel issue that has resolved itself already through the ruling of the SCA.

Under Telkom's own argument, the SCA decision removed any preclusive effect of the D.C. Circuit judgment. Telkom's Third Circuit brief acknowledged Telcordia's undisputed right to file this action following a reversal by the SCA: "Telcordia may file a new enforcement action in the U.S. *if the award is reinstated in the South African appeal.*" (Pet. 19 n.7 (emphasis added).) Telkom's Petition for Certiorari similarly argues that, under the D.C. Circuit's judgment, Telcordia "might bring a new petition to confirm the award *if the award were reinstated.*" (Pet. 2 (emphasis added); *see also* Pet. 7 (arguing that the D.C. Circuit

dismissed the action "so that Telcordia might refile if the South African courts reinstated the award"); Pet. 16-17 (arguing that the necessary "set of events" for "relitigation" is "Telcordia's continuing efforts to reinstate the award through its South African appeal," and that such reinstatement is a "precondition to suit").)[5]

Since Telkom's own arguments confirm that Telcordia is not currently estopped from seeking judicial confirmation of its award, there is no basis for granting review of the estoppel issue. There is absolutely no reason for this Court to grant certiorari on an issue that is no longer presented in the case.[6]

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[5] Furthermore, the SCA's decision also means that the Third Circuit's decision authorizes a new action by Telcordia. The Third Circuit's affirmance of the dismissal without prejudice explicitly recognized that Telcordia could file a new action after the SCA ruled: "Telcordia can re-file when the Supreme Court of Appeal of South Africa has issued a judgment in the case." (Pet. App. 15a.)

[6] This conclusion is not changed by the fact that Telkom has filed an eleventh-hour collateral attack on a minor aspect of the SCA's decision. *See supra* Section G. The current state of the law in South Africa is that the trial court's decision is a nullity, and Telcordia's award is valid and fully enforceable. This Court should not grant review on the estoppel issue based on speculation that the collateral attack on the SCA decision could revive the estoppel issue as a live controversy in this case.

It is worth noting that the SCA's decision warrants denying review of the estoppel issue even if, as a technical matter, the issue is not moot, given the pendency of the collateral attack on the SCA's decision in South Africa. Regardless of whether the issue is moot, this Court should not, as a discretionary matter, grant review on an issue that is currently gone from the case, based on speculation that the issue could return to the case in the future. Of course, putting aside any potential or actual mootness, the estoppel issue does not warrant review in any event because the Third Circuit's holding is consistent with well-established principles of law. *See supra* Part I.

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III. THE THIRD CIRCUIT'S DECISION ON PERSONAL JURISDICTION DOES NOT WARRANT REVIEW

The Third Circuit correctly held that Telkom is subject to suit in New Jersey based on Telkom's numerous and extensive contacts with that State, including six specific contacts highlighted by the court as particularly relevant. The Third Circuit relied on well-established principles of Due Process, as interpreted and explained by this Court, in determining that Telkom had sufficient "minimum contacts" with New Jersey that asserting jurisdiction over it complies with "traditional notions of fair play and substantial justice." (Pet. App. 7a (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quotations omitted)).)

The Third Circuit did not create a "special Due Process standard for arbitral award enforcement cases." (Pet. 20.) To the contrary, the Third Circuit explicitly rejected the proposition that Due Process requirements are any different in an arbitral confirmation action than in any other case.

Nor did the Third Circuit create a unique "Third Circuit standard" for deciding personal jurisdiction issues. (Pet. 26.) Rather, the court merely clarified a fundamental point that the New Jersey District Court failed to appreciate in its jurisdictional analysis—that there is an important analytical difference between: (1) the D.C. District Court's analysis of

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At this juncture, the only issue remaining for the Court to consider is whether the personal jurisdiction question—which plainly is not moot—warrants review. *Cf. Powell v. McCormack*, 395 U.S. 486, 496-97 (1969) (explaining that "[w]here one of the several issues presented becomes moot, the remaining live issues supply the constitutional requirement of a case or controversy"). As set forth below, the personal jurisdiction question presented is routine and unremarkable and does not justify issuance of a writ of certiorari.

whether Telkom, as a *foreign instrumentality*, was subject to suit *in the United States*; and (2) the New Jersey District Court's analysis of whether Telkom, as a *private company*, is subject to suit *in New Jersey*.[7]

A. Applying The Traditional Test For Personal Jurisdiction, The Third Circuit Correctly Held That Telkom Is Subject To Suit In New Jersey

In a decision inextricably bound to the specific facts of this case, the court below held that Telkom is subject to jurisdiction in New Jersey based on its numerous and significant contacts with that State. The court cited well-established law interpreting the Constitution's Due Process Clause, including several of this Court's seminal decisions on personal jurisdiction.

The Third Circuit recited and applied this Court's well-established framework for analyzing personal jurisdiction, as set forth in *International Shoe*, 326 U.S. 310, and its progeny. Under this test, the requirements of the Due Process Clause are satisfied when the nonresident defendant

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[7] As explained *supra*, between the time Telcordia filed the action in D.C. and the time it filed in New Jersey, the South African Government divested its majority ownership of Telkom. When Telcordia filed in New Jersey, Telkom was no longer considered an "instrumentality" of a foreign state under the Foreign Sovereign Immunities Act. The legal standards governing personal jurisdiction and venue that Telcordia had relied on to bring the first petition in D.C. were no longer relevant. In New Jersey, unlike in D.C., Telcordia had to establish jurisdiction over Telkom in the same manner as any other private company. In New Jersey, unlike in D.C., Telkom's contacts with a specific state were critical to the court's jurisdictional analysis. The court below therefore recognized that the change in Telkom's ownership distinguished the jurisdictional analysis from that of the D.C. court. (Pet. App. 9a ("Telcordia offered additional facts in its current petition linking Telkom to New Jersey that were not analyzed by the D.C. District Court.").)

has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316.

The Third Circuit first determined that Telkom had more than sufficient "minimum contacts" with New Jersey. Specifically, the Third Circuit highlighted the following six connections between Telkom and New Jersey:

> (1) Telkom entered into a long-term, quarter-billion dollar contract with a New Jersey company;
>
> (2) significant activities related to the contract were performed in New Jersey;
>
> (3) Telkom visited New Jersey on numerous occasions in connection with the contract;
>
> (4) Telkom communicated with Telcordia's New Jersey office extensively;
>
> (5) Telkom paid Telcordia via a New Jersey bank [; and]
>
> (6) Telkom breached the contract by failing to make payments to said New Jersey bank.

(Pet. App. 8a.)

In accordance with this Court's precedents, the Third Circuit noted that it must consider "the totality of the circumstances" in deciding the jurisdictional question. (Pet. App. 11a.) Beyond reciting the specific contacts listed above, the Third Circuit emphasized several aspects of the parties' relationship and Telkom's contacts with New Jersey. For example, the court noted that the underlying contract involved "customized merchandise" and was not simply "the isolated interaction of a supplier putting an item into the stream of commerce." (Pet. App. 9a.) The Third Circuit

also concluded that a "significant part of the business relationship" had taken place in New Jersey. (Pet. App. 10a.) The court correctly held that, viewed as a whole, these contacts demonstrated "purposeful availment" of the New Jersey forum. (Pet. App. 10a.)

Simply put, the Third Circuit's holding is entirely consistent with numerous decisions of this Court. *See Burger King*, 471 U.S. 462 (holding that personal jurisdiction could be asserted over a non-resident defendant where the defendant negotiated a long-term contract with a forum corporation, significant activities related to the contract were performed in the forum, the defendant communicated by mail and telephone to the forum, defendant made payments to the plaintiff in the forum, and the defendant breached the contract by failing to pay the plaintiff in the forum); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992) (explaining that the issuance of negotiable debt instruments denominated in United States dollars payable in the forum state was highly relevant to finding personal jurisdiction over a foreign defendant); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222-23 (1957) (holding that a single contract with a forum state resident entered into by mail met the minimum contacts test because the single transaction created a substantial connection with the forum state).[8]

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[8] There is no basis for Telkom's argument that the Third Circuit "disregarded the principles of *Asahi Metal*" in holding that Telkom, a foreign entity, is subject to jurisdiction in New Jersey. (Pet. at 26.) In *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 112-13 (1987), the foreign defendant's attenuated connection to the forum state (California) was limited to the mere "placement of a product into the stream of commerce" that later ended up in California. Here, Telkom's numerous and direct contacts with New Jersey, including a quarter-billion dollar contract with a New Jersey resident, are much more extensive. *See supra* Part III.A. Indeed, the Third Circuit specifically

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B. The Third Circuit Did Not Announce A New Rule For Analyzing Personal Jurisdiction

The court below did not create a "new" or "special" rule for establishing personal jurisdiction in international arbitration confirmation proceedings. In fact the decision directly refutes such a rule. The decision is consistent with prior case law analyzing personal jurisdiction in the context of an arbitration confirmation action.

The court also did not craft a unique "Third Circuit standard" for interpreting Due Process requirements. Telkom's argument to the contrary is based on a mischaracterization of the court's analysis.

1. The Third Circuit Did Not Create A "Special" Standard For Analyzing Jurisdiction In International Arbitration Confirmation Proceedings

The Third Circuit did not announce a new rule for establishing jurisdiction in the context of an international arbitration enforcement action. Rather, the court applied the traditional test for jurisdiction within the specific facts of this case. That this case is an arbitration confirmation proceeding, as opposed to a routine commercial dispute, was just one of the many specific facts cited by the court. It was

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noted that the parties' contract required "customized merchandise" and thus "did not constitute the isolated interaction of a supplier putting an item into the stream of commerce to be fished out by a consumer." (Pet. App. 9.) Furthermore, in *Asahi Metals* the Court emphasized that California's interest in adjudicating the dispute was "slight," because the plaintiff was not a forum resident. 480 U.S. at 114. Here, applying the same rationale with the opposite result, the Third Circuit emphasized "New Jersey's interest in adjudicating this dispute" involving a New Jersey resident. (Pet. App. 10a.)

by no means determinative.

In fact, the Third Circuit explicitly *rejected* the notion that it could apply a "special, relaxed standard" (Pet. 21) of Due Process within the context of arbitral confirmation actions. The court stated: "*the New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien.*" (Pet. App. 10a (emphasis added).) Telkom's suggestion that the decision stands for the exact opposite principle is ridiculous.

The Third Circuit appropriately acknowledged the nature of this proceeding (*i.e.*, that this is an arbitral confirmation action) because that factor is relevant to the traditional personal jurisdiction analysis. This Court's decisions dictate that a nonresident defendant must "reasonably anticipate being haled into" the forum. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). As the Third Circuit explained, not only did Telkom have numerous contacts with New Jersey, but also Telkom should have expected that Telcordia, a New Jersey resident, would seek confirmation of an arbitration award in New Jersey. (Pet. App. 7a-11a.)

Considering the nature of the proceeding as one of the mix of factors does not constitute formulation of a new "special, relaxed standard of minimum contacts." (Pet. 21.) To the contrary, the decision below applies long-settled principles of minimum contacts in a particular factual context, raising no issue worthy of this Court's review.[9]

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[9] The Third Circuit did not suggest otherwise when it referred to the "lens of Third Circuit law." (Pet. App. 9a.) In that statement, the Third Circuit was clarifying the fact—missed by the New Jersey District Court—that the personal jurisdiction analysis in this New Jersey action is *not* identical to the personal jurisdiction analysis in the prior D.C. proceedings. (Pet. App. 9a.) That is because, among other things, the D.C. District Court was plainly *not* analyzing whether Telkom, as a private company, was subject to jurisdiction in the State of New Jersey.

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2. The Third Circuit's Analysis Is Consistent With Prior Decisions Involving Confirmation Of Foreign Arbitral Awards

The Third Circuit's decision is consistent with the New York Convention case law cited by Telkom. None of those cases involved a non-resident defendant with substantial and extensive contacts with the relevant forum State. Certainly none of those cases involved the same six factors cited by the Third Circuit as critical to its jurisdictional analysis.

For example, the Ninth Circuit's analysis in *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), is easily distinguishable from this case, because—unlike here—the defendant's contacts with the forum state in that action were virtually nonexistent. In *Glencore Grain*, a Netherlands corporation filed a confirmation action in California, seeking to enforce a London arbitral award won against an Indian company. *Id.* at 1119. Unlike this case, (1) the plaintiff was not a resident of the forum in which it filed suit (thus the forum's interest in adjudicating the dispute was lessened); (2) there was no showing that significant portions of the underlying contract were performed in the forum state; (3) the defendant did not make payments to the forum state; and (4) the defendant did not breach the underlying contract by failing to make payments into the forum state. *Id.* at 1123-25.

The other arbitral confirmation cases cited by Telkom in which courts refused to assert jurisdiction over foreign

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Of course—unlike the New Jersey District Court—the D.C. District Court had no reason to (and did not) focus on "the specific contacts between Telkom and New Jersey." (Pet. App. 9a.) Thus, the decision below did not apply or announce any unique "Third Circuit standard" for determining personal jurisdiction issues. (Pet. 26.)

defendants are similarly distinguishable. *See Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 211, 214-15 (4th Cir. 2002) (finding no personal jurisdiction over defendant where a Channel Island corporation sought confirmation of Moscow arbitral award against a Russian corporation in Maryland, when business dealings occurred abroad, dispute involved performance abroad, and the Russian company's few contacts with the forum did not relate to the dispute); *Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 26 (S.D.N.Y. 1985) (finding no personal jurisdiction over defendant in New York where a Liberian corporation sought confirmation of London arbitral award against a Panamanian corporation with a principal place of business in Greece when business dealings occurred abroad, dispute involved performance abroad, and the Panamanian corporation had no contacts with New York); *Creighton Ltd. v. Qatar*, 181 F.3d 118, 120, 127-28 (D.C. Cir. 1999) (finding no jurisdiction over defendant where a Cayman Islands corporation based in Tennessee sought confirmation of a Paris arbitral award against the government of Qatar in the District of Columbia when contract was offered, accepted, and performed in Qatar, payment was made in Qatari currency to a bank account in Qatar, and the alleged breach occurred in Qatar).[10]

Accordingly, the decision below does not create a conflict among the lower federal courts, and review by this Court is not warranted.

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[10] The other circuit-level New York Convention cases cited by Telkom are also not in conflict. In *Dardana Ltd. v. A.O. Yuganskneftegaz*, the court simply remanded for jurisdictional discovery. 317 F.3d 202, 208-09 (2d Cir. 2003). In *TMR Energy Ltd. v. State Property Fund of Ukraine*, the D.C. Circuit did not even reach the issue of minimum contacts or Due Process because it held that the defendant, a foreign "instrumentality," was not a "person" within the meaning of the Fifth Amendment. 411 F.3d 296, 305 (D.C. Cir. 2005).

CONCLUSION

The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

GRANT L. CLARK
SCIENCE APPLICATIONS INT'L CORP.
10260 Campus Point Drive
San Diego, CA 92121
(858) 826-5068

JAY G. SAFER
LORD, BISSELL & BROOK LLP
885 Third Avenue, 26th Floor
New York, NY 10022
(212) 812-8305

CHARLES M. LIZZA
KEVIN R.J. SCHROTH
LEBOEUF, LAMB, GREENE & MACRAE LLP
125 West 55th Street
New York, NY 10019-5389
(212) 424-8583

ALLEN B. GREEN
Counsel of Record
DANIEL G. JARCHO
WILLIAM T. O'BRIEN
DANIEL L. RUSSELL JR.
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Respondent

January 16, 2007

APPENDIX

THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case number: 26/05
Reportable

In the matter between:

TELCORDIA TECHNOLOGIES INC	APPELLANT
and	
TELKOM SA LTD	RESPONDENT
CORAM :	HARMS, CONRADIE, CLOETE, LEWIS AND PONNAN JJA
HEARD:	30 & 31 OCTOBER 2006
DELIVERED:	22 NOVEMBER 2006
Summary:	Arbitration - review of award - grounds for setting aside
Neutral Citation:	This judgment may be referred to as *Telcordia Technologies Inc v Telkom SA* [2006] 139 SCA (RSA).
Order:	The court order appears at para 158.

JUDGMENT

HARMS JA:

A. Introduction

[1] This appeal relates to the review of consensual international commercial arbitration proceedings. The review is under s 33(1) of the Arbitration Act 42 of 1965. The court below, per de Villiers J, upheld an application brought by Telkom SA Ltd for the review of an arbitral award. It set aside an interim award (which was final in effect) in favour of the appellant, Telcordia Technologies Inc, a Delaware corporation. The arbitrator was Mr Anthony Boswood QC, a London barrister. Telkom is a local company and is the present respondent. The high court not only set aside the award; in addition it removed the arbitrator and appointed three new arbitrators, retired South African judges, in his stead.

[2] In spite of the fact that the argument before the high court lasted six weeks, and the hearing of the application for leave to appeal another three days, the court dismissed the latter application out of hand. This Court, on petition, granted the necessary leave. We uphold the appeal for the reasons that follow but because of the nature of the submissions this judgment contains some repetition.

[3] The high court in essence held that the arbitrator had committed gross irregularities in the proceedings in the course of interpreting a contract between the parties. The alleged irregularities related in summary to the nature of the evidence that the arbitrator took into account; and whether he had failed to appreciate the import of South African law in relation to both contractual interpretation and to the amendment of written contracts. Matters not decided below but raised as grounds of review were, broadly, whether the arbitrator had exceeded the bounds of the terms of reference; whether he had made findings without evidence; whether he had failed to give Telkom the opportunity to lead further

evidence; and whether he had erred in refusing to state a case for an opinion by the court in terms of s 20 of the Act.

[4] The high court in setting aside the award disregarded the principle of party autonomy in arbitration proceedings[1] and failed to give due deference to an arbitral award, something our courts have consistently done since the early part of the 19th Century.[2] This approach is not peculiar to us; it is indeed part of a worldwide tradition. Canadian law, for instance, 'dictates a high degree of deference for decisions . . . for awards of consensual arbitration tribunals in particular.'[3] And the 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes'[4] have given rise in other jurisdictions to the adoption of 'a standard which seeks to preserve the autonomy of the forum selected by the parties and to

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[1] See the article series by RH Christie beginning with 'Arbitration: Party Autonomy or Curial Intervention: The Historical Background' (1994) 111 *SALJ* 143. *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZR 669.

[2] *Eg Dutch* Reformed *Church v Town Council of Cape Town* (1898) 15 SC 14 at 21; *Dickenson & Brown v Fisher's Executors* 1915 AD 166 at 174; *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A). The Roman Dutch approach mentioned in *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A) is of historical interest only.

[3] *United Mexican States v Feldman Karpa* 2005 CanLII 249 (ON CA) para 37. For the current English approach: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43. The New Zealand approach is set out in *Trustees of Rotoalra Trust v Attorney-General* [1998] 3 NZLR 89 (HC) at 101-102.

[4] *Mitsubishi Motors Corporation v Solar Chrysler-Plymouth Inc* 473 50 US 614 (1986) per Blackmum J at 629.

minimize judicial intervention when reviewing international commercial arbitral awards.'[5]

[5] Blackmum J made these pointed remarks in this regard:[6]

> 'As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration", *Kulukundis Shipping Co v Amtorg Trading Corp* 126 F2D 978, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.'

[6] The structure of the remainder of this judgment is as follows:

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[5] *Re The International Commercial Arbitration Act SBC (Quintette Coal Ltd v Nippon Steel Corp)* 1986, C. 14, 1990 CanLII 304 (BC SC) quoted in *United Mexican States* at para 36. A special deference approach does not arise on the facts of this case. It should be noted that South Africa has not adopted the 1985 UNCITRAL Model Law, which strictly limits the involvement of courts in the arbitral process.

[6] *Mitsubishi Motors Corporation v Soler Chrysler-Plymouth Inc supra.*

B. The arbitration clause (para 7-10).

C. The non-variation clause (para 11-13).

D. The structure of the Integrated Agreement and Telcordia's delivery obligations (para 14-22).

E. The dispute (para 23-24).

F. Telcordia's claims (para 25-27).

G. The second amendment (para 28).

H. The May issues (para 29-30).

I. The arbitrator's award (para (31).

J. The grounds for review (para 32-43).

K. The relationship between the Constitution and the Arbitration Act (para 44-51).

L. The meaning of s 33(1)(b): 'gross irregularity' and 'exceeding powers' (para 52-79).

M. The nature of the inquiry, the duties of the arbitrator, and the scope of his powers (para 80-89).

N. How did the arbitrator understand his duties? (para 90-93).

O. The findings by the high court relating to the arbitrator's misconceptions about his duties, and exceeding his powers (para 94-101).

P. The primary question and the *Shifren* doctrine (para 102-116).

Q. The sign-off requirement (para 117-122).

R. The disclaimers (para 123-126).

S. Testing for compliance (para 127-131).

T. The London agreement (para 132-142).

U. The section 20 issue (para 143-156).

V. Conclusion (para 157).

W. The order (para 158).

Repudiation is dealt with in the accompanying judgment of Cloete JA.

B. <u>The Arbitration Clause</u>

[7] The agreement which formed the subject matter of the arbitration is known as the Integrated Agreement and was concluded on 24 June 1999. It contained an arbitration clause which was independent of the validity of the Integrated Agreement. The clause provided that 'all disputes between the parties that may arise' had to be determined by an arbitrator. This included 'disputes related to interpretation' of the agreement, as well as 'disputes of a legal nature'. It further stated that the award would be final and binding, and the parties undertook to give effect to the award.

[8] The arbitration had to take place before a single arbitrator in terms of the rules of the International Chamber of Commerce (the ICC). Under these rules, a sole arbitrator has to be of a nationality other than those of the parties. No provision was made for an arbitral appeal board. Mr. Boswood was appointed accordingly.

[9] The terms of reference cited and incorporated the arbitral clause. In addition, they provided that the issues that had to be decided were those that arose from the claims and counterclaims as set out in the pleadings. Importantly, they contained a provision to the effect that the arbitrator did not necessarily have to decide all the issues raised in the pleadings if he deemed it unnecessary or inappropriate. On the other hand, he could also decide 'any further issues of fact or law' which he, in his discretion, deemed 'necessary or appropriate'. And he was entitled to decide the issues 'in any manner or order he deems appropriate.'

[10] Both the proper law and the law governing the arbitration proceedings were, in terms of the Integrated Agreement, South African law, and our courts have jurisdiction over the arbitration and the review proceedings.

C. The Non-Variation Clause

[11] One of the principal complaints of Telkom was that the arbitrator did not understand and did not apply our law dealing with variations of written contracts. The Integrated Agreement contained a non-variation clause - the contract could only have been amended by means of a written agreement signed by certain duly authorised persons - as well as a provision preventing either party from relying on waiver or estoppel. The exact terms of the non-variation clause are of little consequence because it is common cause that the Integrated Agreement was not amended according to its terms.

[12] The effect of a non-variation clause has been the subject of two judgments of this Court, namely *Shifren*[7] and, latterly, *Brisley v Drotsky.*[8] For the sake of convenience t intend to refer to the principles as the *Shifren* doctrine. The arbitrator, although not formally schooled in South African law, understood the principles perfectly well and he summarised them in these terms: A non-variation clause is in principle valid; it takes effect so as effectively to entrench both itself and all the other provisions of the contract against oral variation; courts do not have a general discretion to ignore it in favour of an oral amendment on the ground of some over-arching notion of bona fides; and the principle does not create an unreasonable straitjacket because the general principles of the law of contract still apply, and these

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[7] *SA Sentrale Ko-op Graanmaatskappy BpK v Shifren* 1964 (4) SA 760 (A).

[8] 2002 (4) SA 1 (SCA).

may release a party from its workings. One of these would, for instance, be the rule that a party may not approbate and reprobate. This would mean, as Telkom correctly accepted during argument, that a party may not rely on a non-compliant variation (for instance, in its pleadings) and subsequently invoke the non-variation term in order to avoid the effect of the amendment.

[13] To this the arbitrator added:[9]

> 'My own provisional view, expressed with all due diffidence, would be that the position may be very different in a case where the evidence shows that A and B have orally agreed on a mode of performance by B of his contractual obligation to A different from that originally specified in the contract, where that different mode of performance was agreed upon *for the mutual benefit of both parties*, and where B has, to the knowledge and with the acquiescence of A, *done the work and/or laid out the necessary resources in pursuance of that different made of performance*. In such a case it would be, to say the least, most surprising *if* the law was that A, when presented with the results of B's substituted performance, could simply refuse to accept it on the ground that the agreement to such substituted performance was not concluded in writing or otherwise memorialized in accordance with the requirements of a No Oral Variation Clause. I was shown a number of authorities which strongly suggest that such is, indeed, not the law.'

He relied in this regard on the judgment in *Van der Walt v Minnaar*[10] which, it would appear to me, provides some

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[9] Emphasis in the original.

[10] 1954 (3) SA 932 (O).

support for his view. The effect of *Van der Walt v Minnaar* is, quite sensibly, that the acceptance of substituted performance does not amount to a variation of the contract.

D. The Structure of the Integrated Agreement and Telcordia's Delivery Obligations

[14] Telkom provides mainly two types of telecommunication services: voice and non-voice. Voice services are services and network components that provide customers with the ability to transmit voice conversations over a telecommunication network. Non-voice services enable customers to transmit data. The main object of the Integrated Agreement was to provide Telkom with a state-of-the-art automated telecommunication system driven by 14 different highly specialized software products. These had to be developed and individualized to satisfy Telkom's specific operational requirements. They had to provide Telkom with the capability of managing both Voice and Non-Voice Flow-Thru service activation and provide quality assurance of the activated services. Flow-Thru was defined as an end to end process flow. The information had to flow between functions, organisation parts, and groups of systems.

[15] These software systems had to be delivered in phases called releases. For present purposes two releases are important: Telcordia had to ship (a) the Voice Software on 30 June 2000; and (b) the Non-Voice Software on 29 December 2000. The total contract value of the Voice software was some US$ 51,8m and US$ 34,8m for the Non-Voice software.

[16] Both shipments of software had to be preceded by the shipment (six months earlier) of the 'specifications' of the software to be delivered. These 'Software Feature Specifications (FDD)' were defined in the Integrated Agreement. It is important to note at this juncture that the arbitrator found as a fact that specifications - called FSDs or Feature Specification Descriptions - were mutually

developed and agreed between Telcordia and Telkom, and that Telkom had paid for them some US$ 5,18m and US$ 3,48m respectively on the agreed dates.

[17] The essence of the dispute the arbitrator was called on to decide at the proceedings that gave rise to the interim award related to the benchmark of Telcordia's software Voice ('06/00') and the Non-Voice ('12/00') delivery obligation. This depended on an interpretation of the Integrated Agreement.

[18] Thus far I may have created the impression that the Integrated Agreement was a contract that could be read and understood from the first page to the last. Nothing could be further from reality. But first some background. In October 1998, Telkom issued to prospective bidders a Request for Bid, setting out its requirements. Telcordia responded by means of Statements of Compliance (SOC), contained in 14 binders, stating the extent to which it could or would comply with the Request for Bid. The updated Request for Bid and SOCs were incorporated into the Integrated Agreement as 'exhibits'. (The Integrated Agreement had various parts, all except the first (which was also called the Integrated Agreement) referred to as exhibits; and all had different contractual rankings.)

[19] The Project Plan (exhibit F) ranked first. The Project Plan was defined as the detailed plan and schedule for the delivery of the software systems. It was to include the delivery milestones for the software and the dates on which it had to be delivered; and it was to identify the capability of the software (the 'specific functionality (and features) to be included in each release of the Licenced Software delivered by Telcordia on a particular delivery milestone'). The Project

Plan could have been amended by means of the 'scope change provisions'.[11]

[20] The Project Plan consisted of a number of 'annexures'. Annexure A was the Flow-Thru WBS (work breakdown structure) Project Schedule for the execution of the various tasks required. Annexure B was a bar chart containing a very brief summary of some of the Information set out in Annexure A. For instance, in relation to the Non-Voice release it indicated the shipping date and then gave the periods for installation, testing, live pilot and production/ rollout. This particular bar contained a caveat which is dealt with later. Annexure D contained a payment schedule while Annexure E set out certain general assumptions as well as Telkom's responsibilities, and some conditions precedent.

[21] Exhibit C, ranking lower than the Project Plan, dealt with the software 'specifications' and defined this term. In particular it stated in clause 9.2 that the software had to be delivered in compliance with the conditions of the Integrated Agreement and that the Project Plan would be the operative document for Telcordia's delivery obligations.'[12]

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[11] The arbitrator found that no such variations had taken place.

[12] 9.2 Contractual Delivery Date

'9.2.1 The Contractual Delivery Dates specified in the Project Plan are of the utmost importance. Non-compliance with said dates will constitute a material breach of this Agreement. Partial delivery will not constitute Delivery.

9.2.2 The Licenced Software will be delivered in accordance with this Agreement and the Project Plan set forth as Exhibit F to the Integrated Agreement. The true intention and meaning of this Agreement is that the SUPPLIER will, in all respects, supply, deliver, install, commission, render and complete the Licenced Software in a workman-like manner to the satisfaction of TELKOM

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[22] I have not quoted the text of the other relevant contractual provisions because they have been set out in great detail by both the arbitrator and the high court and because this judgment is not concerned with the Interpretation of the Integrated Agreement but with the question whether the arbitrator committed reviewable irregularities.

E. The Dispute

[23] I have already alluded to the dispute between the parties concerning Telcordia's delivery obligations. Telcordia, in short, contended that it had to deliver software that complied with the preceding specifications (the FSDs), which had been mutually developed and agreed upon, and had been paid for by Telkom. Telkom, on the other hand, argued that the Project Plan had precedence over Exhibit C, which contained the definition of 'specifications'. The Project Plan, it said, in terms of the Integrated Agreement had to identify the specific functionality and features of each release. This meant that these must be sought in the Project Plan, especially the WBS read with the bar chart. In any event, clause 9.2.2 required that the software should be in accordance with the Project Plan. Because the Project Plan was not specific and did not detail the required functionalities and features, the Integrated Agreement by necessary implication required that *all* the features and functionalities necessary for purposes of providing the 06/00 Voice and 12/00 Non Voice Flow-Thru had to be included in the respective releases.

[24] Telcordia justified its 06/00 delivery and its tender to deliver the 12/00 Software on its interpretation of its

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as mutually agreed in the Proposal and the acceptance criteria mutually agreed upon by the Parties.'

delivery obligations. Telkom, relying on its contrary interpretation, disputed that Telcordia had duly performed in relation to the 06/00 release, which justified its refusal to pay the balance outstanding on that release; and, in addition, Telkom rejected Telcordia's tender of the 12/00 software. Telcordia therefore sent Telkom a notice, requiring it to cure its alleged repudiation. Telkom refused to do so and Telcordia accordingly sent a notice of cancellation. Telkom, in turn, purported to cancel on the ground that Telcordia's delivery of the 06/00 and its tender of the 12/00 software were not in accordance with its obligations under the Integrated Agreement; and that Telcordia's attempted cancellation amounted to a repudiation, which Telkom accepted. Many of the claims and counterclaims were therefore dependent on the correct interpretation of the Integrated Agreement in relation to the capability of the software that had to be delivered.

F. Telcordia's Claims

[25] Some of Telcordia's claims need special mention because of the fact that they play a role in this judgment. Claim B was in respect of the balance owing in respect of the 06/00 release. Telkom had paid 60 per cent of the amount due on delivery but had failed to pay the balance. Telcordia relied in the main on the Integrated Agreement for its entitlement to be paid. In the alternative it relied on the so-called London agreement, something I deal with in part T of this judgment. This agreement was concluded orally in London on 12 October 2000. Telkom undertook to pay the 60 per cent immediately (which it did) and the balance with the 12/00 release. All this is common cause. What is not is Telkom's reliance on conditions precedent for payment of the 40 per cent.

[26] Claim C was for the moneys due as a result of the 12/00 release, of which Telkom refused to accept delivery.

These moneys were claimed on either a contractual basis or as damages.

[27] Claim G dealt with Out of Scope services (extras). As mentioned, there is a provision dealing with changes to the Project Plan by means of extras. Telkom's plea to this claim included a reliance on the *Shifren* principle. Significantly, for what follows, it was not raised in connection with any other claim, including claims B and C.

G. The Second Amendment

[28] Telcordia's so-called second amendment was an amendment to its plea to Telkom's counterclaim. There it raised an alternative, based on the supposition that Telkom's primary interpretation would have been upheld and Telcordia's interpretation rejected. In this Telcordia relied in relation to the Non-Voice software on a term of the moratorium agreement, which had been entered into 'on or about 1 April 2000', and also on an oral or implied agreement somewhat later concerning the Voice software. Telkom informed the arbitrator that it would rely on *Shifren* and Telcordia stated that it would raise estoppel. These issues were not expressed in the pleadings because the ICC rules do not permit further pleadings but they were nevertheless issues in the arbitration and were articulated in para 3 of the May issues.

H. The May Issues

[29] The parties agreed during the course of the arbitration to a separate adjudication of some aspects of the case. The issues thus formulated were referred to as the May issues. The outcome would have disposed of much of the case: indeed, Telkom's view was that a ruling in its favour would have disposed of all Telcordia's claims. As it turned out, the ruling was in Telcordia's favour and a dismissal of all Telkom's claims followed.

[30] The May issues were thus formulated (para 2.1 reflecting Telcordia's interpretation of its contractual obligations while para 2.2 reflected Telkom's understanding):[13]

> 1. On a proper construction of the Integrated Agreement (IA) dated 24 June 1999, having regard to the terms thereof and all admissible evidence in relation thereto:
>
> 1.1 What is the contractual baseline for determining the specific features and functionality of the software to be delivered by Telcordia to Telkom in each of the various software releases provided for in the IA;
>
> 1.2 How are the contractual delivery dates for particular software features and functionality to be determined?
>
> 2. In particular, on a proper construction of the IA, having regard to the terms thereof and all admissible evidence in relation thereto, was Telcordia required:
>
> 2.1 to deliver software in June and December 2000 which complied with the Feature Specification Descriptions (FSDs) in respect of each of those software releases (as contended by Telcordia); or
>
> 2.2 to deliver all features and functionality necessary for purposes of providing Voice Flow-Thru by way of the June 2000 software releases and all features and functionality necessary for purposes of providing Non-voice Flow-Thru by

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[13] It is not necessary to quote paras 4 and 5.

way of the December 2000 software release (as contended by Telkom)?

3 If Telcordia was required in terms of the IA to deliver all features and functionality necessary for purposes of providing Voice Flow Thru by way of the June 2000 software release and all features and functionality necessary for purposes of providing Non-Voice Flow-Thru by way of the December 2000 software release, was Telcordia's obligation modified in any way as a consequence of the allegations pleaded in Telcordia's second amendment (of which notice was given on 25 March 2002) and, if so, in precisely what way was the obligation modified?

I. The Arbitrator's Award

[31] The arbitrator accepted Telcordia's interpretation in relation to the primary question and accordingly found it unnecessary to deal with the subsidiary questions. He went further by disposing of another issue, namely the repudiation issue. This he did by holding that Telkom had repudiated the Integrated Agreement and that Telcordia had validly accepted the repudiation, and by dismissing Telkom's counterclaims. Whether he was entitled to do this is a matter which is dealt with in the accompanying judgment of Cloete JA where the relevant parts of the award are quoted. Suffice it to say already at this juncture that the position of the parties, as expressed by Telkom, was that the arbitrator was requested, in the best interests of the parties and in accordance with the spirit of the ICC rules; to decide as many of the issues that could fairly have been determined in the light of the evidence, both oral and written, led at the May proceedings.

J. The Grounds for Review

[32] The grounds for any review as well as the facts and circumstances upon which the applicant wishes to rely have to be set out in the founding affidavit. These may be amplified in a supplementary founding affidavit after receipt of the record from the presiding officer, obviously based on the new information which has become available.[14]

[33] Telkom, in its founding affidavit relied for reviewing the arbitrator's award on some of the provisions of s 33(1) of the Act. It reads:

'Where–

> (a) any member of an arbitration tribunal has misconducted himself in relation to his duties as arbitrator or umpire; or
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> (b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or
>
> (c) an award has been improperly obtained, the court may, on the application of any party to the reference after due notice to the other party or parties, make an order setting the award aside.'

Telkom did not rely on para (c) but on misconduct under (a) and the two grounds of (b), namely, gross irregularity and the exceeding of power.

[34] Telkom alleged that the arbitrator had committed gross irregularities in the conduct of the proceedings by -

> (i) breaching an undertaking or promise to receive further evidence relevant to the 'London agreement';

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[14] Uniform r 53.

(ii) failing to refer legal questions for the opinion of the court under s 20; and

(iii) proceeding to hand down his award in the face of a pending s 20 application.

[35] The accusation of misconduct in relation to his duties was based on the allegations that the arbitrator –

(i) had made key findings which were 'grossly incorrect, unfair and unreasonable'; and

(ii) had expressly ignored relevant evidence which manifested bias and partiality.[15]

[36] The statement that the arbitrator had exceeded his powers was based on the allegations that –

(i) he proceeded to hand down his award in the face of a pending s 20 application;

(ii) he had made key findings which were 'grossly incorrect, unfair and unreasonable'; and

(iii) he had ignored important provisions of the Integrated Agreement.

[37] The arbitrator filed a short report to the court in which he dealt with the nub of the attack on his integrity; his alleged inability to deal with South African law; the allegation that he had made findings for which there was no evidence; his alleged breach of an undertaking; and some allegations concerning s 20.

[38] Telkom used, if not abused, its right to amplify by filing a supplementary affidavit of 120 pages in which it attacked the arbitrator's report and expanded on the allegation of bias. In addition, Telkom raised a new ground

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[15] The allegation relating to bias and partiality was also linked to the common law but nothing turns on this.

of review, relating to the finding that Telcordia had validly cancelled the agreement and the dismissal of Telkom's counterclaims. This argument was based on both legs of s 33(1)(b).

[39] In its replying affidavit and without explanation or apology Telkom withdrew the allegation of misconduct. This allegation, as noted, had two legs but as time went on Telkom sought, successfully in the high court, to rely on some of the facts that were proffered in support of this allegation.

[40] At the hearing in the high court Telkom relied on two review grounds only, namely the s 20 issue and the repudiation issue. But during Telcordia's argument in answer, and through the intervention of the court, the alleged 'grossly incorrect' findings (on which Telkom no longer relied) were metamorphosed into 'gross irregularities' and expanded, and, in the event, became the basis of the judgment below.

[41] The case as developed by Telkom in its written argument also deviated appreciably from the allegations that were levelled against the arbitrator in the founding papers, and the number of points taken was in inverse proportion to their merit. During the hearing of the appeal another seismic shift took place.

[42] Symptomatic of this case is the 'verbal manipulation'[16] indulged in by the high court and by Telkom by reclassification and relabelling. As the Bard said about roses, a spade remains a spade even if called a shovel or a pitchfork. Telkom for example raised for the first time on appeal the complaint that the arbitrator had acted irrationally. It spent pages and pages on the legal argument but did not

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[16] A phrase used by Wade and Forsyth *Administrative Law* 8 ed at 270.

even bother to provide us with the factual foundation for tl submission. This came only after a questionnaire from th Court was put to the parties. In the answer given by Telko we were told that what in the past had been called gro irregularities or misconduct was now irrational behaviou For the legal submission Telkom relied on the panoply of t common law, the rule of law, the right to a fair trial, the rig to property, and the Act. During oral argument, thoug Telkom limited its submission. Irrationality, it now said, w a species of gross irregularity. This submission failed appreciate that irrationality is an outcome standard while, I shall demonstrate, gross irregularity is a process standa Interestingly, it is not alleged that the arbitrato interpretation of the Integrated Agreement was irrational. will appear in due course, there is no factual basis for any these attacks.

[43] After all is said and done, the grounds of revi ultimately relied on were these:

> (a) by interpreting the Integrated Agreement incorrectly the arbitrator committed a material error so fundamental that he misconceived the nature of the inquiry and his duties;
>
> (b) by breaching an undertaking to hear oral evidence on the London agreement the arbitrator committed a gross irregularity;
>
> (c) by denying Telkom the opportunity to apply to court under s 20 of the Act for an order compelling him to state legal questions for the decision by the court, the arbitrator committed a gross irregularity and acted irrationally;
>
> (d) by deciding the repudiation question and dismissing Telkom's counterclaims the arbitrator exceeded his authority and decided a question

without evidence, thereby committing a gross irregularity and acting irrationally.

K. The Relationship between the Constitution and the Arbitration Act

[44] As a starting point, the constitutionality of the Arbitration Act is not in issue and its validity is a given.[17] Indeed, Telkom conceded without any judicial prodding that the Act as interpreted by our courts passes constitutional muster. However, the Act must be read in the light of the provisions of the Bill of Rights and the meaning attributed to it must promote the spirit, purport and objects of the Bill of Rights.

[45] Two sections of the Bill of Rights were raised during argument. They are s 33, which deals with just administrative action, and s 34, which deals with access to courts. In the light of the judgment of this Court in *Total Support*[18] the administrative justice provision can be discounted. There it was pointed out that administrative justice is concerned with the exercise of public power or the performance of a public function, something with which consensual arbitration is not concerned.[19] Smalberger ADP said in this regard (para 24):

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[17] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 29.

[18] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA).

[19] Cf *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the RSA* 2000 (3) BCLR 241, 2000 (2) SA 674 (CC) para 45: 'Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional

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> 'Arbitration does not fall within the purview of "administrative action". It arises through the exercise of private rather than public powers. This follows from arbitration's distinctive attributes, with particular emphasis on the following. First, arbitration proceeds from an agreement between parties who consent to a process by which a decision is taken by the arbitrator that is binding on the patties. Second, the arbitration agreement provides for a process by which the substantive rights of the parties to the arbitration are determined. Third, the arbitrator is chosen, either by the parties, or by a method to which they have consented. Fourth, arbitration is a process by which the rights of the parties are determined in an impartial manner in respect of a dispute between parties which is formulated at the time that the arbitrator is appointed.'

Telkom did not argue that this decision was wrong and approached the matter from a different angle, as I shall indicate later.[20]

[46] That brings me to the access to courts provision, s 34, which reads as follows:

> 'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where

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principles which define the authority of each branch of government, their interrelation ship and the boundaries between them.'

[20] The position with statutory arbitrations is different: *Rustenburg Platinum Mines Ltd v CCMA* [2006] 115 (RSA).

> appropriate, another independent and impartial tribunal or forum.'

[47] The question whether s 34 is at all applicable was also discussed in *Total Support* but this Court left the question open. On balance, I believe that s 34 is indeed applicable. This would be in accordance with the approach of the European Court of Human Rights (ECHR).[21] But, as Smalberger ADP said (para 28), there is nothing to prevent parties from defining (at least in private consensual disputes) what is fair for purposes of their dispute. This is consonant with the approach in *Napier v Barkhuizen*[22] where Cameron JA, with reference to *Brisley v Drotsky*,[23] said (para 12):

> 'the Constitution prizes dignity and autonomy, and in appropriate circumstances these standards find expression in the liberty to regulate one's life by freely engaged contractual arrangements. Their importance should not be under-estimated.'

And (para 13):

> 'the Constitution requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of "freedom of contract", while seeking to permit individuals the dignity and autonomy of regulating their own lives. This is not to envisage an implausible contractual nirvana. It is to respect the complexity of the value system the Constitution creates. It is also to recognise that intruding on apparently voluntarily concluded arrangements is a step that judges should

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[21] *Suovaniemi v Finland ECHR* case no 31737/96 (23 Feb 1999).

[22] [2006] 2 All SA 459 (SCA). See also *Marlin v Durban Turf Club* 1942 AD 112 at 130 *in line*.

[23] 2002 (4) SA 1 (SCA) para 94 and 95.

countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements.'

(48] The rights contained in s 34 (as the ECHR accepted) may be waived unless the waiver]s contrary to some other constitutional principle or otherwise *contra bonos mores.* Parties to a private dispute may, for instance, compromise their dispute and thereby forego all their rights under s 34. By agreeing to arbitration, parties waive their rights *pro tanto.*[24] They usually waive the right to a public hearing. They may even waive their right to an independent tribunal.[25] Counsel gave the example of two children who ask a parent to arbitrate their commercial dispute. The example in the ECHR is even more telling. The parties each appointed their own arbitrator and they, in turn appointed a third. The one arbitrator had earlier acted for and advised the one party to the dispute. 'The second party became aware of this but proceeded happily with the arbitration. The national court had held that the second party thereby waived his right to an independent tribunal. The ECHR confirmed that such a waiver was permissible and not inimical to a fair trial guarantee similar to that in s 34.

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[24] *First Options of Chicago Ire v Kaplan* 115 8 Ct 1920; 514 US 938 per Breyer J: '. . . a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances.'

[25] This is not possible under the ICC rules although it has always been possible under our legal system: Johannes Voet 4.8.9; *The Rhodesian Railways Ltd v Mackintosh* 1932 AD 359 at 373; *Marlin v Durban Turf Club supra.*

(49] In this case, by agreeing to arbitration under the]CC rules, the parties agreed (in terms of art 28.1) to the following:[26]

'Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to recourse insofar as such waiver can validly be made.'

In addition, art 33 provides:

> 'A party who proceeds with the arbitration without raising its objection to a failure to comply with any provision of these Rules, or of any other rules applicable to the proceedings, any direction given by the Arbitral Tribunal, or any requirement under the arbitration agreement relating to the constitution of the Arbitration Tribunal, or to the conduct of the proceedings, shalt be deemed to have waived its right to object.'

[50] By agreeing to arbitration parties to a dispute necessarily agree that the fairness of the hearing will be determined by the provisions of the Act and nothing else.[27] Typically, they agree to waive the right of appeal,[28] which in context means that they waive the right to have the merits of their dispute relitigated or reconsidered.[29] They may,

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[26] *CBI NZ Ltd v Badger Chiyoda* [1989] 2 NZR 669.

[27] They may even reduce the level of procedural fairness by, e g, agreeing that the arbitrator may decide the matter without hearing them.

[28] Without a special provision there is in any event no appeal possible because appeals are only possible from lower courts tc higher courts.

[29] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A) at 169F-G; *CBI NZ Ltd v Badger Chiyoda*

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obviously, agree otherwise by appointing an arbitral appeal panel, something that did not happen in this case.

[51] Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s 33(1) of the Act. By necessary implication they waive the right to rely on any further ground of review, 'common law' or otherwise. If they wish to extend the grounds, they may do so by agreement but then they have to agree on an appeal panel because they cannot by agreement impose jurisdiction on the court. However, as will become apparent, the common-law ground of review on which Telkom relies is contained - by virtue of judicial interpretation - in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgment below and the argument presented to us, it is incumbent on me to take the tortuous route.

L. The Meaning of Section 33(1)(6): 'Gross Irregularity' and 'Exceeding Powers'

(52] The term 'exceeding its powers' requires little by way of elucidation and this statement by Lord Steyn says it all:[30]

(footnote continued from previous page)

[1989] 2 NZR 669. This is also possible in ordinary litigation and is specifically provided for in the Magistrates' Courts Act 32 of 1944 s 82.

[30] *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43 pare 24. Emphasis added. Cf *Bull HN Information Systems Inc v Hutson* 229 F 3d (1st Cir 2000) 321 at 330: 'To determine whether an arbitrator has exceeded his authority ... courts "do not sit to hear claims of factual or legal error ...."... and "[e]ven where such error is painfully clear, courts are not authorized to reconsider the merits of arbitration awards" . . .'

> 'But the issue was whether the tribunal "exceeded its powers" within the meaning of section 68(2)(6) [of the English Act]. This required the courts below to address the question whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. *If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under section 68(2)(b) is involved.* Once the matter is approached correctly, it is clear that at the highest in the present case, on the currency point, there was no more than an erroneous exercise of the power available under section 48(4). The jurisdictional challenge must therefore fail.'

Apart from the proper application of the test nothing more was made in argument of the meaning of the term. The argument focussed on the meaning of 'gross irregularity in the conduct of the arbitration proceedings.'

[53] This term must be understood in context, historical and textual. (I have already dealt with the constitutional considerations.) The ground is to all intents and purposes identical to a ground of review available in relation to proceedings of inferior courts.[31] Although the textual setting

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[31] Supreme Court Act 59 of 1959, s 24(1):

'The grounds upon which the proceedings of any inferior court may be brought under review before a [high court], are

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(footnote continued on next page)

is different, which might affect its meaning,[32] I am content to hold that for present purposes the two provisions are identical and that cases decided in relation to the review of inferior courts are relevant in determining the meaning and scope of para (b).

[54] The Act was preceded by three colonial statutes. They, following the approach of the pre-Union courts, broke completely with the Roman-Dutch tradition by providing that an arbitral award is not appealable, that is, that its merits may not be the subject of attack.[33] But they particularly provided that an award could be set aside on the ground of misconduct or if improperly procured.[34]

[55] The review of an award based on a wrong construction of a deed of partnership was the subject of *Dickenson & Brown*.[35] This Court held that a review on this basis was impermissible on two grounds. The first was the general principle that when parties select an arbitrator as the judge of fact and law, the award is final and conclusive, irrespective of how erroneous, factually or legally, the decision was. Second, the colonial laws (in that case the one

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(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.'

[32] One problem, which does not arise in this case, concerns the boundary between 'misconduct and 'gross irregularity'. These two concepts may overlap, especially if regard is had to the fact that historically 'legal misconduct' was nothing other than a procedural lapse: *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 (QBD) per Bingham J.

[33] *Dutch Reformed Church v Town Council of Cape Town* 15 SC 14 at 21; *Dickenson & Brown v Fisher's Executors* 1915 AD 168 at 174.

[34] Eg Arbitration Act 29 of 1898 (C) s 17.

[35] Above.

of Natal) did not change the position. Such an error, he held could not amount to misconduct unless the mistake was so gross and manifest that it could not have been made without some degree of misconduct or partiality, in which event the award would be set aside not because of the mistake, but because of misconduct.[36]

[56] Solomon JA recognised that it would have been a valid ground for setting aside the award if an arbitrator had 'exceeded his powers': to exceed one's powers does not go to merit but to jurisdiction. He also held that there is no distinction between a mistake on the face of the award and one not appearing on the face of it, a rule abolished in England only in 1969.[37] Furthermore, he held that the English rule, which permitted courts to set aside awards on the ground of mistakes of law, was not part of our law.[38]

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[36] Cf *Crystal Springs Aerated Water Co v Kan* 1902 TH 21 at 27.

[37] At 167-169, *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL).

[38] At 177-178. English law at that stage provided that if a specific question of law was submitted to an arbitrator, as happened in this instance when the interpretation of the Integrated Agreement was submitted to the arbitrator for decision, an erroneous decision could not have been reviewed. 'Otherwise it would be futile ever to submit a question of law to an arbitrator: *In re King and Duveen* (1913] 2 KB 32 at 36. But if a question of law had not specifically been referred but was material to the decision, and he made a mistake, apparent on the face of the award, the award could be set aside: *Attorney-General for Manitoba v Kelly* (1922) 1 AC 268 (PC) at 283. To decide whether there was an error 'apparent on the face of the award' the court could only have regard to the terms of the award or some paper accompanying and forming part of the award. Also *FR Absalom Ltd v Groat Western (London) Garden Village Society Ltd* [1933] AC 592 (HL). As to the artificiality surrounding the meaning of 'forming part' see *Giacomo Costa Fu Andrea v British Italian Trading Co Ltd* [1962] 2 All ER 53 (CA).

[57] Did the introduction by the 1965 Act of para (b) indicate a changed intention? Is it likely that the legislature would have intended to introduce a review on substantive grounds (taking into account that an appeal is also not possible) by using the procedural language of 'gross irregularity in the conduct of the arbitration proceedings'? I think not and this Court also did not think so when called upon to decide the effect of errors of law on an award under the current Act. In two instances, namely *Veldspun* and *Total Support* this Court confirmed the correctness of the *Dickenson & Brown* approach.[39]

[58] Telkom expressly disavowed reliance on a general power of courts to review errors of law committed by arbitrators but instead relied on (1) a common-law power to review awards that are tainted by 'material errors of law' and (ii) s 33(1)(b), arguing that where the arbitrator misconceives the whole nature of the inquiry or his duties in connection therewith he commits a gross irregularity in the proceedings, The high court, I should mention, decided the matter on ground (ii).

[59] I intend to deal first with the common-law point. As Telcordia mentioned, Telkom was unclear on whether it intended to rely on the common law relating to arbitration or that concerning administrative law. *Dickenson & Brown,*[40] I have said, held that there was no common-law review under arbitration law. In addition, I have already expressed the view that a party to a consensual arbitration under the Act is not entitled to rely on an administrative common-law review ground.

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[39] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (1) SA 162 (A); *Total Support Management (Pty) Ltd v Diversified Health Systems* (SA) *(Pty) Ltd* 2002 (4) SA 661 (SCA).

[40] Above.

[60] In our law the principles of administrative justice have now been subsumed by the Constitution and, as stated, the considerations underlying them are different from those that apply to arbitration. This difference has also been recognised in England, as Lord Steyn said:[41]

> 'The reasoning of the lower courts, categorising an error of law as an excess of jurisdiction, has overtones of the doctrine in *Anisminic Ltd v Foreign Compensation Commission* [1959] 2 AC 147 which is so well known to the public law field. It is, however, important to emphasise again that the powers of the court in public law and arbitration law are quite different. This has been clear for many years, and is now even more manifest as a result of the enactment of the 1996 [English Arbitration] Act.'

[61] Telkom sought to rely in argument on *Anisminic* and a statement by Malan J[42] (relying indirectly on *Anisminic*) for the proposition that all decisions based on a material error of law stand to be reviewed. As mentioned, *Anisminic* was concerned with administrative action, as was Malan J's judgment. In any event, *Anisminic* has been misunderstood by many, including Denning MR, who sought to derive from it the general principle mentioned by Malan J. Denning MR put his view with characteristic vigour when he said in a public lecture that no court or tribunal has any jurisdiction to make an error of law on which the decision of the case

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[41] *Lesotho Highlands Development Authority v Impregiio SpA* [2005] UKHL 43 para 25.

[42] *South African Jewish Soard of Deputies v Sutherland NO* 2004 (4) SA 368 [W) at para 27.

depends.[43] He was soon put right by the House of Lords in *Racal*.[44]

[62] *Racal* was followed by the House in *Page*,[45] a judgment on which Malan J relied for his general proposition so eagerly embraced by Telkom. The House emphasised[46] that in the case of decisions of administrative tribunals made under statutory powers a relevant error of law in the actual making of the decision, which affects the decision, may be corrected on review unless Parliament intended that the administrative body was to be the final arbiter of questions of law. If, however, a law provided that a judicial body's decision was to be final and conclusive on a question of law, there was no reason to assume that a review would be permitted. In *Page* the issue concerned the position of a 'visitor', someone who, in terms of university rules, was the 'sole judge' of the interpretation and application of the university's domestic rules. Errors of law committed by a visitor within his jurisdiction were held not to be subject to judicial scrutiny.

[63] As mentioned, even before the 1979 English Arbitration Act, legal questions, such as the construction of a contract that had been specifically referred to an arbitrator, could not be reviewed on the ground of error.[47] In the

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[43] Quoted by Malan J.

[44] *Re Racal Communications Ltd* [1980] 2 All ER 634 (HL). Also in *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1980] 2 All ER 689 (HL) at 692f-j.

[45] *Page v Hull University Visitor* [1993] 1 All ER 97 (HL).

[46] Per Lord Browne-Wilkinson at 108j.

[47] *FR Absalom Ltd v Great Western (London) Garden Village Society Ltd* [1933] AC 592 (HL).

present case, it will be recalled, the interpretation of the contract was specifically referred to the arbitrator.

[64] This Court, in *Hira v Booysen*,[48] dealing with a statutory administrative tribunal, referred with approval to *Anisminic* and to *Racal*, and did so without suggesting that the Denning approach, which had been rejected in *Racal*, was correct. It was in this context that Corbett CJ formulated the following rule (at 93C-D):

> 'Where the complaint is that the tribunal has committed a material error of law, then the reviewability of the decision will depend, basically, upon whether or not the Legislature intended the tribunal to have exclusive authority to decide the question of law concerned. This is a matter of construction of the statute conferring the power of decision.'

[65] Corbett CJ was at pains to draw a distinction between common-law reviews and those based on statute (such as the present)[49] and to state expressly that the quoted rule (and the others mentioned by him) applies to the former.[50] Apart from the fact that I do not believe that he intended to propound a rule applicable to consensual arbitrations, the rule would in any event prevent the review of material errors of law because the arbitrator was, subject to the limitations in the Act, intended to have exclusive jurisdiction over questions of fact and law. That follows

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[48] 1992 (4) SA 69 (A).

[49] Eg at 83G-H, 851-J, 87A, 88B-C. As Botha JA mentioned, the statutory grounds are narrower than the common-law grounds: *Paper, Printing, Wood & Allied Workers' Union v Pienaar* NO 1993 (4) SA 621 (A) at 639E-F.

[50] At 93A.

from the provisions of the Act, which exclude appeals and limit reviews. The fact that a court may be approached to decide a question of law under s 20 does not affect this conclusion. If s 20 were used, a review or appeal for an error of law is not possible because, once again, the opinion of the court (of first instance) and even that of counsel (learned or otherwise) is final. A statutory provision such as that contained in s 28, that unless the arbitration agreement provides otherwise, an award is, subject to the provisions of the Act, final and not subject to appeal, and that each party to the reference must abide by and comply with the award in accordance with its terms, clearly indicates that the Legislature intended the arbitral tribunal to have exclusive authority to decide whatever questions were submitted to it, including any question of law. That is what the parties agreed. This does not imply that the arbitrator has the exclusive right to decide the scope of his jurisdiction because if he exceeds his powers the award is reviewable on that ground.

[66] Telkom also sought to rely on a tacit term of the arbitration agreement, submitting that it would not have agreed to a term permitting the arbitrator to commit a gross error of law. In this regard Telkom referred to what Jansen JA had said in *Theron*[51] when dealing with the interpretation of a constitution of a church, namely that it is not to be assumed that parties to a contract would have agreed to be

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[51] *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A) at 21E-F. What Jansen JA had to say about arbitrations was put in perspective in *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 99-100. See also *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) paras 19-21.

subjected to unreasonable actions.[52] Although I agree with the generality of the proposition, it should be stressed that the judgment of Jansen JA dealt with the question of whether a church body had interpreted its constitution correctly and had followed the correct disciplinary appeal procedure: in other words, he sought to determine the scope of the mandate of the church body as agreed in its constitution. This question, he held, was not something falling within the exclusive jurisdiction of the church body. Apart from the fact that the principles concerning domestic tribunals are not the same as those governing administrative or arbitration proceedings[53] here the scope of the arbitrator's mandate is not in issue.[54]

[67] in any event, the parties bound themselves to arbitration in terms of the Act and if the Act, properly interpreted, does not allow a review for material error of law, one cannot imply a contrary term. Also, parties cannot by agreement extend the grounds of review as contained in the Act.

[68] Even assuming the jurisdiction to review on the ground of material error of law, the question arises as to what is meant by the adjective `material'. Telkom sought to draw a distinction between 'mere' errors and 'material'

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[52] A much wider statement by Van Dijkhorst J in *Stocks Civil Engineering (Pty) Ltd v Rip* NO (2002) 23 ILJ 358 (LAC) para 38 is contrary to all authority. obviously, the supposition underlying any arbitration agreement is that the arbitrator has to apply the law of the land; it does not follow that if he errs his award can be set aside.

[53] *Lamprecht v McNeillie* 1994 (3) SA 665 (A) at 668, Also *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (CA) at 1180D-1181.

[54] This does not apply to the repudiation issue but that is a separate matter.

errors and in effect argued that all errors that make a party lose the arbitration are material. This approach renders the difference between appeals and reviews meaningless and in effect gives a right of appeal, which the Act prohibits.

[69] Errors of law can, no doubt, lead to gross irregularities in the conduct of the proceedings. Telcordia posed the example where an arbitrator, because of a misunderstanding of the audi principle, refuses to hear the one party. Although in such a case the error of law gives rise to the irregularity, the reviewable irregularity would be the refusal to hear that party, and not the error of law. Likewise, an error of law may lead an arbitrator to exceed his powers or to misconceive the nature of the inquiry and his duties in connection therewith.

[70] *Hira v Booysen* concerned the scope of the tribunal's mandate or 'jurisdiction'. The tribunal had to determine whether Hira had done something 'in public'. It misconstrued this term, which defined its powers, and, accordingly, committed a 'material' error. Fortunately I need not pursue this further because Telkom relied on only one type of error as being material: where a decision maker misconceives the whole nature of the inquiry or his duties in connection therewith. This common-law ground also applies to a review under a statute that provides that a gross irregularity in the course of the proceedings may be reviewed. It is therefore unnecessary to delve much further and redo the exercise that Corbett CJ did in *Hira v Booysen* and analyse the line of cases again.

[71] That brings me to the judgments of Greenberg and Schreiner JJ in *Goldfields Investment*.[55] The case dealt with a review of a lower court on the statutory ground of 'gross

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[55] *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551.

irregularity' and held that the term encompasses the case where a decision-maker misconceives the whole nature of the inquiry or his duties in connection therewith. In the light of the general acceptance of the rule, also by this Court, a reconsideration of its validity, does not arise. But that is not the end of the inquiry because it is apparent that both the high court and Telkom misunderstood the rule and misapplied it. I therefore propose to analyse the case law in this regard and then consider whether the arbitrator's alleged misconceptions fall within the rule.

[72] It is useful to begin with the oft quoted statement from *Ellis v Morgan*[56] where Mason J laid down the basic principle in these terms:

'But an irregularity in proceedings does not mean an incorrect judgment; it refers not to the result, but to the methods of a trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined.'

[73] The *Goldfields Investment* qualification to this general principle dealt with two situations. The one is where the decision-making body misconceives its mandate, whether statutory or consensual. By misconceiving the nature of the inquiry a hearing cannot in principle be fair because the body fails to perform its mandate.[57] *Goldfelds Investment* provides a good example. According to the applicable Rating Ordinance any aggrieved person was entitled to appeal to the magistrates' court against the value put on property for rating purposes by the local authority. The appeal was not an

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[56] *Ellis v Morgan, Ellis v Dessai* 1909 TS 576 at 581.

[57] *Mabaso v Native Commissioner, Ladysmith* 1958 (1) SA 130 (N) provides another example. For common-law review examples see *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) esp at 598A-D.

ordinary appeal but involved, in terms of the Ordinance, a rehearing with evidence. The magistrate refused to conduct a rehearing and limited the inquiry to a determination of the question whether the valuation had been 'manifestly untenable'. This meant that the appellant did not have an appeal hearing (to which it was entitled) at all because the magistrate had failed to consider the issue prescribed by statute. The magistrate had asked himself the wrong question, that is, a question other than that which the Act directed him to ask.[58] In this sense the hearing was unfair. Against that setting the words of Schreiner J should be understood:[59]

> 'The law, as stated in *Ellis v Morgan (supra)* has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to

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[58] *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 234A-B.

[59] At 560-561, emphasis added.

the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial.* One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. *I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was contemplated by the section.* That being so, there was a gross irregularity, and the proceedings should be set aside.'

[74] The other line of cases, which dealt with reviews of inferior courts, was concerned with orders made where a jurisdictional fact was missing or, put differently, 'a condition for the exercise of a jurisdiction had not been satisfied'.[60] A typical example is *Primich*.[61] The magistrate

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[60] An expression used in *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 230C.

[61] *Primich v Additional Magistrate, Johannesburg* 1967 (3) SA 661 (T).

could order, in terms of the relevant court rule, the provision of security if the plaintiff was not resident in the country. The magistrate, in spite of the limitation on his jurisdiction, made such an order against a plaintiff who was resident in the country. Objectively, this was not a case of an error of law; it was an error of fact dressed up as an error of law. Decisions of a factual nature can all too easily be dressed up as issues of law.[62] There was no indication that the magistrate had misinterpreted the rule; he misunderstood the facts, holding that a jurisdictional fact was present while it was not. A similar instance was *Visser v Estate Collins*.[63] in terms of the statute concerned, the magistrates' court could set aside a void judgment granted by default provided the application for rescission was made within one year of the date on which the applicant first had knowledge of the invalidity. The magistrate set aside a void judgment by default without any evidence as to when the applicant had become aware of the invalidity. Once again, the magistrate had failed to determine whether a jurisdictional fact for the setting aside of the judgment was present. Whether this was due to an error of law is really beside the point.

[75] In all these cases the complaint was directed at the method or conduct and not the result of the proceedings.[64] Where the legal issue is left for the decision of the functionary any complaint about how he reached his decision must be directed at the method and not the result. This is known as the *Doyle v Shenker*[65] principle.

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[62] *Page v Hull University Visitor* [1993] 1 All ER 97 (HL) at 101a.

[63] 1952 (2) SA 546 (C).

[64] *Bester v Easigas (Pty) Ltd* 1993 (1) SA 30 (C) at 42G-43D.

[65] *Doyle v Shenker & Co Ltd* 1915 AD 233.

[76] It is wrong to confuse the reasoning with the conduct of the proceedings. Although the line may be fine and sometimes difficult to draw, I believe that the following example makes the difference clear. In *Jooste Lithium*[66] the inspector had the authority to decide any dispute that could arise in regard to the validity of the pegging or beaconing of claims and to decide any dispute arising through over-pegging. Against that background O H Hoexter JA said:[67]

> 'It is clear that in deciding the disputes which he is authorised to decide, there is entrusted to the inspector the duty not only of finding the relevant facts but also of deciding the legal issues Involved (see *Johannesburg City Council v Chesterfield House (Pty) Ltd* 1952 (3) SA 809 at p 825 (AD). In deciding the legal issues involved it would also be the duty of the inspector to interpret the relevant sections of the Proclamation and the regulations.'

[77) The Proclamation conferred a right of appeal from the inspector to the Administrator, whose decision was to be final, With that in mind, Hoexter JA continued:[68]

> 'It seems to me, with respect, that the learned Judge erred in holding that the Interpretation of the regulations is a matter for the Court and that the Administrator is bound by the Court's interpretation. In my opinion the Legislature intended that the regulations should be interpreted in the first instance by the inspector and on appeal by the Administrator. It is for the Administrator to

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[66] *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A).

[67] At 564G.

[68] At 569B-G, emphasis added.

decide any legal issues involved in a dispute as to the pegging of a claim, and the most important legal issue is the interpretation of the regulations. *It cannot be said that the wrong Interpretation of a regulation would prevent the Administrator from fulfilling its statutory function or from considering the matter left to it for decision. On the contrary, in interpreting the regulations the Administrator is actually fulfilling the function assigned to if by the statute, and it follows that the wrong interpretation of a regulation cannot afford any ground forreview by the Court.* (See *Doyle v Shenker & Co Ltd* 1915 AD 233.)

The present case differs from cases like *Goldfields Investment Ltd v City Council of Johannesburg*, 1938 TPD 551, in which the result of the wrong interpretation of a section in the relevant statute was that the magistrate never directed his mind to the issue which in terms of the statute it was his duty to decide, in the present case the Administrator must direct [his] mind to the Issue whether the requirements of the regulations have been observed and in order to decide that issue it is bound to interpret the regulations.'

[78] It will be necessary to consider the facts on which the high court relied to determine whether what the arbitrator did in this matter falls within the purview of *Goldfields Investment* or within *Doyle v Shenker*. This does not mean that the two principles are mutually exclusive. It simply means that if the arbitrator does not fall foul of *Goldfields Investment*, the principles of *Doyle v Shenker* apply.

[79] Before turning to the facts it is necessary to dispose of Telkom's concluding argument on this aspect of the case. It was that the Issue of 'gross irregularity' should be answered by asking whether Telkom, in the words of

Schreiner J, had a fair trial on the interpretation issue. That a party is entitled to a fair trial, as Telcordia said, is not contentious. Telkom accepted that the high court never had asked itself this question and that its own heads of argument had not dealt with the point. When invited by us to state why the hearing had been unfair, counsel who argued this aspect deferred to his lead counsel who, in turn, chose to disregard the invitation. We were left with a chasm between the legal and factual argument.

M. The Nature of the Inquiry, the Duties of the Arbitrator, and the Scope of his Powers

[80] Before considering the attack on the arbitrator on the ground that he had committed gross irregularities in the conduct of the arbitration proceedings (by misconceiving the nature of the inquiry and his duties) or exceeded his powers, it is necessary to determine the nature of the inquiry, the arbitrator's duties, and his powers.

[81] As mentioned at the outset, according to the integrated Agreement the arbitrator had to determine all disputes between the parties, including disputes relating to the interpretation of the agreement and disputes of a legal, financial and technical nature; the procedural rules of the ICC were to apply; the laws of the Republic would govern the agreement; and, subject to the arbitration clause, the parties consented to the jurisdiction of South African courts.

[82] The May issues, as defined, required the arbitrator to determine Telcordia's primary contractual obligation under the Integrated Agreement 'having regard to the terms thereof and all admissible evidence in relation thereto'. In this regard he had to choose between two opposing contentions. It is clear from the way the May issues were defined that the questions were interdependent and that, depending on the outcome of, say, question 1, question 3 could have fallen away.

[83] In short, the arbitrator had to (i) interpret the agreement; (ii) by applying South African taw; (iii) in the light of its terms, and (iv) all the admissible evidence.

[84] In addition, the arbitrator had, according to the terms of reference, the power (i) not to decide an issue which he deemed unnecessary or inappropriate; (ii) to decide any further issues of fact or law, which he deemed necessary or appropriate; (iii) to decide the issues in any manner or order he deemed appropriate; and (iv) to decide any issue by way of a partial, interim or final award, as he deemed appropriate.

[85] The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the inquiry or his duties In connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the *nature of the inquiry* - they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the inquiry. To adapt the quoted words of Hoexter JA.[69] It cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.

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[69] *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A).

[86] Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly.[70] Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it. If such an error amounted to a transgression of his powers it would mean that all errors of law are reviewable, which is absurd.

[87] In support of this I revert to *Doyle v Shenker*,[71] a case that dealt with a review on the ground of a gross irregularity in the proceedings. Innes CJ said in a passage that speaks for itself:[72]

> 'Now a mere mistake of law in adjudicating upon a suit which the magistrate has jurisdiction to try cannot be called an Irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear.

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[70] *Armah v Government of Ghana* [1966] 3 All ER 177 at 187 quoted in *Anisminio Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL) at 223D-F.

[71] *Doyle v Shenker & Co Ltd* 1915 AD 233.

[72] At 236-237.

Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to sec. 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good ground for an appeal. But there would be no gross irregularity in the proceedings, and therefore no justification for a review.'

[88] Innes CJ added:[73]

'It was suggested that, in the present instance, the fact that the magistrate did not deal with the merits, would constitute a gross Irregularity. But If he considered the document to be conclusive, there was no need to discuss the merits. He may have been wrong in that view, but that would be an error of law only, and not an irregularity.

The admission of illegal evidence is in itself an independent ground of review.[74] But the document in question was not Improperly received in

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[73] At 238.

[74] But not under the Arbitration Act.

> evidence; indeed, it could not properly have been excluded, if the magistrate's reading of It, and of the bearing of the statute upon it, was wrong, that could again be a mistake of law, which, as already pointed out, could afford no basis for review proceedings.'

[89] There is another matter that falls under this rubric and that concerns the repudiation. issue. I have already mentioned that at the conclusion of the May hearing the arbitrator was requested, in the best interests of the parties and in accordance with the spirit of the ICC rules, to decide as many of the issues as could fairly have been determined in the light of the evidence, both oral and written, led at the May proceedings. Using this power he decided that Telkom had repudiated and that Telcordia had accepted the repudiation. It was within the power of the arbitrator, in the light of the extension agreement between the parties, to decide the scope of his mandate.[75]

N. How did the Arbitrator understand his Duties?

[90] The arbitrator understood clearly that his duty was to interpret the agreement and that he had, in this regard, to choose between the conflicting contentions of Telcordia and Telkom. Nowhere in his award is there any indication that he sought to do anything else. He understood particularly well that he had to determine the meaning of the contract with reference to its true construction and that he could only have regard to admissible evldence.[76] In fact, he complained during the hearing about the relevance of some of the

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[75] *Amalgamated Clothing & Textile Workers Union of SA v Veldspun (Pty) Ltd* 1994 (t) SA 162 (A) where the English authorities are also mentioned. For the USA: *First Options of Chicago Inc v Kaplan* 115 S Ct 1920; 514 US 938 at 943 per Breyer J.

[76] The award is replete with references to this.

evidence relating to construction but the parties Insisted that he should hear it. He 'stressed' (his word) that his interpretation was based on the wording and structure of the Integrated Agreement itself.

[91] The arbitrator understood that he had to apply South African law. He knew that he could only rely on background evidence and not on surrounding circumstances, and he stated that he had kept this in mind in interpreting the Integrated Agreement.[77] He did not refer to any identifiable surrounding circumstances in his award although he did refer to the subsequent conduct of the parties in order to interpret the agreement without finding that the agreement was ambiguous. This he did consciously, relying on Christie,[78] who in turn relies on *Shill v Milner*[79] as explained by Goldstone J in *Briscoe v Deans*.[80] The rule is that evidence of subsequent conduct is admissible, even where the agreement is on its face unambiguous, if the parties by consent lead such evidence.

[92] The arbitrator was fully conscious of *Shifren* and, as I have mentioned, his award shows that he understood the principle and its implications fully. He did, however, come to the conclusion that the doctrine did not arise in the circumstances of the case.

[93] In the end, the arbitrator accepted Telcordia's interpretation and he answered the questions put accordingly. Some of the questions became academic as a result of the

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[77] This is not the occasion to consider whether there is any discernable difference between background facts and surrounding circumstances.

[78] RH *Christie The Law of Contract in South Africa* 5 ed p 218. The arbitrator relied on the fourth edition where the same statement appears.

[79] *Shill v Milner* 1937 AD 101 at 110-111.

[80] *Briscoe v Deans* 1989 (1) SA 100 (W) at 105B.

primary finding and therefore he did not answer them. In fact, they could not have been answered in the light of his conclusion. In answering only some questions and refraining from answering others, and in making rulings and orders consequent upon his primary finding, he consciously used the powers he had according to his terms of reference.[81]

O. The Findings by the High Court relating to the Arbitrator's Misconceptions about his Duties, and Exceeding his Rowers

[94] The findings of the high court on this issue are many and repetitive[82] and are scattered all over the judgment. I have no intention of dealing with them all but shall limit myself to the main findings. The first finding was that the arbitrator had misinterpreted the pleadings. For this the high court undertook a detailed analysis of the pleadings to find that Telkom had relied on *Shifren* in relation to the primary (interpretation) question. The problem is that Telkom had never alleged that the arbitrator had misconstrued the pleadings - it was not a ground of review - and before us Telkom did not seek to make out such a case, I can only say that the court embarked on what could in fairness be described as a judicial snipe hunt.[83]

[95] Although formulated as a separate and alternative ground, the essence of the high court's finding in relation to the interpretation of the Integrated Agreement was that the arbitrator had 'failed to refer to and apply' the applicable principles of proper interpretation, and that this constituted a misconception of the whole nature of the inquiry and of his

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[81] His findings relating to the repudiation issue will be dealt with separately.

[82] The 'additional' reasons are a repetition of the main reasons.

[83] Cf *Dawahare v Spencer* 210 F3d 666 (6th Circuit 2000) at 670.

duties in connection therewith, and that he had exceeded his powers.

[96] The statement that the arbitrator had failed to refer to the applicable principles of construction, as I have indicated in the preceding section of this judgment, amounts to a gross misrepresentation of what the arbitrator did. The court, when dealing with the inadmissibility of surrounding circumstances, provided the reader with a veritable compendium of case law while the arbitrator articulated the same rule in a single sentence but the court did not refer to a single rule of interpretation that the arbitrator had failed to take into account.

[97] Particularly disturbing about the high court's treatment of the arbitrator is that it simply ignored the fact that the arbitrator had relied on authority for utilising evidence concerning subsequent conduct *where the agreement is unambiguous* in interpreting a contract. The court did not even consider this rule - accepted by Telkom as valid - in coming to its decision. It also ignored the fact that Telkom Itself had submitted to the arbitrator that evidence of subsequent conduct of the parties would irrefutably contradict Telcordia's primary contractual argument; that no argument was addressed to the arbitrator by either party that the evidence led was inadmissible; and that Telkom did not allege in the review proceedings that the arbitrator had relied on irrelevant or inadmissible evidence. How it could be said, in these circumstances, that the arbitrator had committed a gross irregularity is incomprehensible.

[98] The high court in any event failed to distinguish between the interpretation Issue and the contractual compliance issue, a distinction the arbitrator perceived at an early stage of the proceedings. The interpretation issue was whether the 'specifications' were to be found in FSDs; and the compliance issue was whether, by delivering the

particular FSDs and, thereafter releasing or tendering the software described in the FSDs, Telcordia had complied with its contractual obligations. However, the court considered the latter also to be a matter of interpretation as is apparent from its treatment of the sign-off and disclaimer issues, matters to which I shall revert in due course.

[99] The high court's approach was to interpret the agreement afresh; to come to a different conclusion about its meaning; and then to conclude that as a result of the difference 'the arbitrator did not apply his mind thereto in a proper manner, [and] that he misconceived the whole nature of the inquiry and his duties therewith' and that he simultaneously exceeded the bounds of his powers. But it was not for the high court to reinterpret the contract; its function was to determine whether the gross irregularities alleged had been committed. By its reinterpretation the court dealt with the matter as an appeal, reasoning in effect that because the arbitrator was wrong it had to follow that he had committed an irregularity. The failure to apply the applicable principles of interpretation or to come to a wrong conclusion does not amount to a 'gross irregularity', as the quotations from *Doyle v Shenker*[84] illustrate. It is circuitous to reason, as the court did, that this alleged failure amounted to a misconception of the whole nature of the inquiry and that consequently the failure amounted to a gross irregularity. The court sought to distinguish *Doyle v Shenker* on the basis that in that case the magistrate committed an error of law while acting within his jurisdiction, implying that by interpreting the Integrated Agreement the arbitrator had acted outside his jurisdiction, which is simply wrong. If one considers the length of the proceedings, the arbitrator's active involvement in defining and refining the issues, and the detailed and reasoned

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[84] 1915 AD 233.

award, it was as presumptuous as it was fallacious for the court to have held that the arbitrator did. not apply his mind properly to the issues at hand.

[100] The high court justified its approach in first interpreting the Integrated Agreement by reference to judgments dealing with statutory reviews where courts, in order to determine whether the functionary had acted within the scope of the statute, first interpreted the enabling statute. This was always done in order to determine the powers and mandate of the functionary.[85] The parallel exercise in this instance required a consideration of the terms of reference and the provisions of the Act, not of the Integrated Agreement.

[101] The gravamen of the high court's decision on the gross irregularity resulting from a wrong interpretation was that the arbitrator had failed to apply *Shifren* when answering the primary question about the delivery baseline. In addition, the court relied on what it thought were three further errors of interpretation to which I shall revert. As stated before, I do not intend to reinterpret the contract because that is not the issue and it does not matter for purposes of a review whether the arbitrator was right or wrong_ I shall accordingly limit myself to a discussion of the reviewable acts said to have been committed by the arbitrator.

P. The Primary Question and the Shifren Doctrine

[102] The primary question in terms of the May issues was whether Telcordia's interpretation relating to its software delivery obligations was correct or whether the interpretation advanced by Telkom was the correct one.

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[85] The same happened In *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A), concerning the constitution of a church.

Telcordia's case, as repeatedly stated. was that it had to deliver software which complied with the FSDs. Telkom's case, on the other hand, was that Telcordia had to deliver 'all' features and functionalities necessary for purposes of providing the two Flow-Thrus. Both parties relied on the terms of the Integrated Agreement for their different points of view.

[103] The arbitrator upheld Telcordia's interpretation while the high court upheld Telkom's interpretation. In doing so, the court ignored the fact that Telkom had, in its pleadings, disavowed the allegation that 'all' had to be delivered and that it was unable to articulate before the arbitrator exactly what had to be delivered - it advanced eight versions.

[104] Telcordia's case, simply put, was this. The Project Plan provided for the delivery by Telcordia of complete specifications (named FDDs in the Project Plan but called in practice, according to the finding of the arbitrator, FSDs) of the software that had to be delivered subsequently. In other words, the specifications were 'deliverables' - part of Telcordia's delivery duty. They did not form part of the Integrated Agreement because they did not exist for a reason, which was spelt out in the definition of 'specifications': specifications in Exhibit C were defined to be the 'requirement specifications', which Telcordia had to supply six months before the delivery date of the actual software, that fully described the capabilities of the software that had to be delivered. In particular, the agreement recorded that 'the parties understand and agree that [Telcordia's] Integrated Response [ie, the SOCs] to [the Request for Bid] is not a typical off-the-shelf offering and that Specifications for the Licenced Software [to be provided by Telcordia] shall be subject to mutual development and agreement by the Parties, and sign off by Telkom.'

[105] In other words, what was required by way of software delivery had to be developed and agreed to by the parties. According to annexure D to the Project Plan, Telkom had to pay substantial amounts for the FDDs. Because FDDs had to be developed in cooperation and agreement with Telkom in the course of performing the contract, FDDs (which were thus mutually developed and agreed upon during the course of the Integrated Agreement and were to. be delivered) did not amend the Integrated Agreement. They did not change the ultimate delivery obligation, which was to comply eventually with the SOCs. Since a set of FDDs was developed for each release, it had to follow that they would also determine when particular features and functionalities had to be delivered.

[106] The arbitrator understood this to be Telcordia's case where he stated that the FSDs were not a substitute for the contractual requirements 'but rather the means whereby they are met'. But the high court, although recognising that Telcordia alleged that it had tendered delivery of the software in terms of the Project Plan while at the same time alleging that it had tendered the software as described in the agreed FDDs, and which had been paid for by Telkom as such, failed to understand this.

[107] In the light of this it is not surprising that Telcordia did not in its pleadings rely on an amendment of the Integrated Agreement which had been effected by the FSDs. It is also not surprising that Telkom did not plead that the FSDs were impermissible amendments to the agreement. This explains why Telkom never argued before the arbitrator that *Shifren* prevented Telcordia from relying on the FSDs.[86] Even when Telkom launched the section 20

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[86] The one sentence at the dying moments of the argument before the arbitrator on which the high court relied did not say otherwise.

proceedings after the conclusion of the proceedings before the arbitrator, it did not raise *Shifren* in connection with the primary question. It raised it in relation to Telcordia's second amendment and later in relation to the London agreement.[87] This confirms the ir pression the arbitrator had, namely that Telkom's reliance on *Shifren* did not arise in relation to the primary question; and it effectively disposes of the high court's interpretation of the pleadings and its assessment of the course of the proceedings, namely that Telkom had raised *Shifren* in the present context.[88]

[108] It is no wonder that the arbitrator said, both in his award and in his memorandum, that *Shifren* did not arise in the context of the primary question and did not need to be considered for the purpose of his award. For the high court to have held that the arbitrator had ignored the *Shifren* rule by failing to consider Telkom's *Shifren* argument in this context is inexplicable. It was not the arbitrator who misconceived the issue; it was, with respect, the court.

[109] The high court found (contrary to the finding of the arbitrator) that one had to look to the Project Plan and the SOCs to determine the specific functionalities and features of the software to be delivered. For this finding the court relied - impermissibly - on parts of the contract that the parties by agreement did not place before the arbitrator. This is another indication of the fact that the court misconceived its function: it even dealt with the review as an appeal in the broad sense taking into account facts that were not before the lower tribunal.

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[87] This was the position as late as 27 August 2000.

[88] The best evidence of Telkom's understanding of the issues especially that *Shifren* does not arise in relation to the determination of the contractual baseline is Telkom's 'List of the Issues to be Decided' of 1 August 2002, the final day of the argument before the arbitrator.

[110] The arbitrator, in reaching his conclusion, had regard to the evidence of Telcordia's expert witness, Prof Bernstein, which was to the effect that the SOCs could not in themselves identify the specific features and funetionalities that had to be included in each individual release of customized software. This evidence the arbitrator used in order to give business efficacy to the agreement. The high court held that the evidence was inadmissible. I fail to see on what basis it could so have been held. It was expert evidence that was necessary for the arbitrator to construe the agreement by placing him as near as may be in the position of the parties to the agreement.[89]

[111] Furthermore, since Telkom had abandoned the argument that the SOCs identified the specific features and functionalities of the software that had to be delivered, it is difficult to appreciate how it can be said that the arbitrator committed a gross Irregularity by failing to accord to the SOCs a contractual meaning which neither party propounded. Telkom jettisoned this argument for good reason: it was common cause that the SOCs did not contain a description of the features and funetionalities of each software release; further that the specifications referred to in the Project Plan were those defined in Exhibit C; and in addition that these had to be mutually developed, delivered by specific dates and paid for on agreed dates. It was common cause that the SOCs Were not mutually developed nor were they intended to be, and, additionally, they were not deliverables - they were pre-existing documents. This explains why Telkom's case was that Telcordia had to deliver all features and funetionalities necessary, and not that the SOCs defined the specific software functionalities. But the 'all' argument also had a fatal flaw in the view of

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[89] Cf *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 614E-G.

the arbitrator because the Project Plan envisaged delivery of upgrades of software. No wonder the arbitrator had a problem with Telkom's case (he could never establish what its case about the FSDs was) and why Telkom as a last resort sought to attack the validity of the contract on the basis that it had no exigible content.

[112] I digress for a moment and deal with the essence of the arbitrator's reasoning. He accepted that the Project Plan had to identify the specific functionality and features to be included in each release. He found that neither the WBS nor the bar charts performed this function and that the only way in which the Project Plan could be read as identifying the specific functionality and feature of each release is if the 'specifications' were read into it. After developing the point he concluded that 'the parties must have intended that the necessary detailed and specific descriptions of those obligations should be found elsewhere'.[90]

[113] It is quite clear that the 'elsewhere' the arbitrator had in mind was the delivery obligation of 'specifications', ie, the FSDs. The high court was under the impression that the arbitrator had thereby referred to the moratorium agreement (discussed above in part G) which, according to it, amounted to an invalid variation of the Integrated Agreement. The court also held that FSDS had their origin in the moratorium agreement, something in conflict with the arbitrator's factual finding that they were not so derived.[91] (Some were developed as a result of the

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[90] Emphasis added.

[91] There may be some confusion in this regard. On the arbitrator's finding there had to be some or other non-*Shifren* agreement on the content of the FSDs and the content of the 12/00 FSDs may in that sense have been derived from the moratorium agreement.

moratorium agreement but that is beside the point since there had to be agreement about their content.) As early as 29 October 1999, it was Telcordia's stated. position that the FSDs defined the software that had to be delivered and that they were official Telcordia deliverables, which required sign-off by Telkom.[92] By December 1999, Telcordia had already delivered the 06/00 FSDs and during March 2000, Telkom had paid for them in full. The moratorium agreement was concluded thereafter, at the end of March 2000. There are two additional points. Telkom relied on the moratorium agreement as part of its defence to the claim (which raises the approbation/reprobation question) and, as the arbitrator explicitly stated, he had not made any findings in relation to the moratorium agreement. His statement that once Telkom had agreed in terms of the relevant FSDs what a particular release should contain, it was not open to it to complain that the same release did not contain something in addition, was entirely consistent and logical, especially in the light of his view that the FSDs had to be agreed to between the parties without thereby amending the Integrated Agreement.

[114] The arbitrator found as a fact that the parties jointly developed and agreed to the content of the FSDs; that they were delivered when the 'specifications' had to be delivered; and that Telkom paid the contract price for 'specifications' for them. The evidence about subsequent conduct was, as the arbitrator noted, in the circumstances admissible (see the discussion above). It was, accordingly, proper for the arbitrator to have had regard to 'the events which happened' in interpreting the Integrated Agreement. The high court, without considering the basis on which the

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[92] This disposes of the argument that reliance on the FSDs was a strategy which Telcordia dreamt up later.

arbitrator used the evidence, held that it was inadmissible. It erred.

[115] The foregoing also disposes of Telkom's submission that the arbitrator transgressed the parol evidence rule. This was not an issue foreshadowed in the review application. In any event, the basis of the argument was, once again, that the FSDs altered the terms of the Integrated Agreement, an argument that I have already dismissed. The submission furthermore conflates and confuses different matters; the integration rule (or parol evidence rule);[93] the rules relating to interpretation;[94] and the *Shifren* rule. The integration rule concerns agreements that *precede* the relevant written jural act.[95] They may not be proved because they are supposed to have been subsumed by or integrated into the written jural act.[96] The arbitrator did not once refer to evidence which could even remotely have been so classified.

[116] But, as the arbitrator noted, some of the December FSDs were not signed off by Telkom. I have already mentioned that according to the definition of 'specifications' they were not only subject to mutual development and agreement by the parties, but also required 'sign off' by Telkom.[97] This is the subject of another debate to which I shall turn. In the present setting, however, the fact that the FSDs were not signed off has no

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[93] Cf *National Board (Pretoria) (Pty) Ltd v Estate Swanepoel* 1975 (3) SA 16 (A) at 26.

[94] *Cf Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 326.

[95] DT Zeffertt, AP Paizes, A St Q Skeen *The South African Law of Evidence* (2003) p 322.

[96] *Johnston v Leal* 1980 (3) SA 927 (A) at 943B-D.

[97] See also the provision In Exhibit F of the Integrated Agreement.

bearing on the meaning of the Integrated Agreement, especially as to what the baseline was. It could only mean that Telcordia should not have been paid for them, but Telkom, so the arbitrator held, had no explanation for having paid.[98] As I have said earlier, the interpretation issue was whether the 'specifications' were to be found in FSDs; and the compliance issue was whether, by having delivered the particular FSDs and by delivering the software described therein or tendering delivery, Telcordia had compiled with its contractual obligations.

Q. The Sign-Off Requirement

[117] The high court found that because the arbitrator had held that the 12/00 FSDs qualified as 'specifications', although they had not all been signed off by Telkom, he committed an irregularity in the interpretation of the contract; that he rewrote the contract; and that he Ignored the evidence about the absence of sign-off. All this, according to the court, meant that the arbitrator had misconceived the nature of the inquiry and his duties in connection therewith.

[118] The high court further found that the sign-off requirement in the definition of specifications 'probably' referred to the contractual requirement in the non-variation clause that amendments be in writing and signed by both parties, and *'probably'* required sign-off only by Telkom because the specifications would, in the nature thereof, be prepared by Telcordia for Telkom's acceptance. These provisional views, which are devoid of any merit, are further indications of the fact that the court conflated the interpretation and compliance issues.

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[98] The pleaded defence of payment under protest was according to the arbitrator not pursued.

[119] The high court also dealt with the absence of 'agreement' about the content of the 12/00 FSDs. It appears that the court held as a matter of fact that there was no agreement about their content, a factual finding in conflict with that of the arbitrator. The arbitrator's factual finding to the effect that there was agreement on the 12/00 FSDs is binding on the parties. I may add that although Telkom complained in its supplementary affidavit about the arbitrator's finding, it did not allege that the finding amounted to either misconduct or gross irregularity; that was reserved for the lack of any finding about sign-off.

[120] The high court's judgment in any event did not do justice to the findings of the arbitrator. The arbitrator did not 'ignore' the evidence about the absence of a formal sign-off; on the contrary, he repeatedly noted that the FSDs had not been signed off. The arbitrator also did not 'rewrite' the contract - he understood that signing off was required, and he never suggested otherwise.

[121] It is apparent that the arbitrator thought, rightly or wrongly, that having mutually developed and agreed on the contents of the FSDs, and having paid for them, the formal requirement of signing off was dispensed with by Telkom. This one can deduce from the arbitrator's reference (in another context) to the principle that acceptance of substitute performance does not fall foul of *Shifren*[99] and the lack of response by Telkom to the letter of 6 July 2000 written by Telcordia's solutions architect, Mr Barlso, who said that sign off was required as an acknowledgement of the receipt of the FSDs.

[122] The arbitrator may have been wrong but this does not mean that he has misconceived the nature of the inquiry or his duties, or that he acted irrationally. The statement by

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[99] See para 13 of this judgment.

Innes CJ quoted earlier has to be borne in mind, namely that the failure to deal with facts that go to the merits of a case is not an 'irregularity'.[100] Even if one assumes that the arbitrator had forgotten about the significance of the lack of signing off, his oversight is still not an irregularity. A factual issue was once again dressed up as a question of law and cross-dressed as a procedural Irregularity.[101]

R. The Disclaimers

[123] The FSDs contained disclaimers inserted by Telcordia. These were not all worded in identical terms but they stated in essence that the features contained in them represented Telcordia's 'current understanding of the functionality required to support this solution' and that they did not represent a 'commitment on behalf of Telcordia to implement the functionalities' since 'such commitments are made by formal contracts'.

[124] The arbitrator did not deal with the disclaimers in his award. This led to a finding by the high court that he had 'apparently ignored the issue' although the 'relevant facts were placed before him'; and this, in turn, meant that he had misconceived the whole nature of the inquiry. The disclaimers, in my judgment, had nothing to do with the interpretation of the Integrated Agreement and by 'ignoring' them the arbitrator could not have erred in his interpretation or committed a material error of law.

[125] The failure to have dealt with a particular factual sub-issue does not mean that the arbitrator misunderstood the nature of the inquiry. It also does not mean that the arbitrator ignored them. It is equally conceivable that he

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[100] *Doyle v Shenker & Co Ltd* 1915 AD 233 at 238.

[101] This is apparent from the way the founding affidavit was formulated.

thought that the issue was not worth pursuing in the light of some of his other findings, which I repeat: he found that the FSDs were deliverables; that they did not amend the Integrated Agreement; that they prescribed the scope of the software that had to be delivered; that they were mutually developed and agreed; and that they were paid for in full without error.

[126] What then is the value of a unilateral statement by Telcordia about the status of the FSDs, inserted without Telkom's consent (as pointed out by Telkom)? I would have thought that the answer is self evident: nothing. It follows that this attack has to fail.

S. Testing for SOC Compliance

[127] The Project Plan made provision for the testing of software for SOC compliance. As the arbitrator accepted, the Project Plan 'suggests' that testing had to take place release by release, If SOC testing had to be release by release, according to Telkom end the high court, Telcordia's argument concerning the FSDs would of necessity have been incorrect. The arbitrator, rightly or wrongly, did not agree.

[128] As Telkom accepted in its founding affidavit, the arbitrator held that testing for SOC compliance had to take place once everything had been delivered and not with each release. The high court also accepted that the arbitrator 'in effect' had made such a finding. This is an understatement.

[129] There is nothing to justify the conclusion that the arbitrator misconceived the nature of the inquiry. At most the arbitrator may have misconceived the importance of the testing provision in the Project Plan. He did not as the high court held (contrary to its 'in effect' finding) ignore the provision. He thought that the provision, which the court held was definitive of the whole issue, only 'suggested' the possibility but, in the context of the Integrated Agreement

as a whole, he must have come to the conclusion that what he called a suggestion could not have overridden the other considerations which he took into account in reaching his conclusion on the interpretation of the Integrated Agreement.

[130] Once again, by virtue of the nature of the inquiry before the high court, and before us, I do not wish to deal with either the. argument by Telcordia about the correctness or that of Telkom about the incorrectness of the arbitrator's conclusion - both are beside the point.

[131] This also applies to the debate surrounding the caveat in the bar chart. Evidence was led to put a perspective on Its meaning and Telcordia made much of this in support of its argument about the interpretation of the Integrated Agreement. The arbitrator noted the argument but did not deal with it. In order to bolster its argument that the arbitrator's interpretation of the Integrated Agreement was correct, Telcordia repeated the argument before the high court. The court did not agree with Telcordia, accepting instead an interpretation which was first mooted by Telkom in its replying affidavit in the review application. Importantly for present purposes, the court did not hold that the arbitrator had committed any reviewable act in this regard and it could in any event not have done so in view of the fact that Telkom did not attempt to make out such a case. The meaning of the caveat was thus yet another irrelevant side show in the review proceedings.

T. The London Agreement

[132] That disposes of the high court's decision and Telkom's attempt to review the award on the ground of the arbitrator's interpretation of the Integrated Agreement. I now turn to deal with the other review grounds, the first of which relates to the London agreement.

[133] Telkom did not pay the agreed US$ 23,3m for the 06/00 software shipment on due date as required by the Project Plan. Its ostensible reason was that the software did not comply with the Project Plan and had a number of critical gaps based on its understanding of Telcordia's delivery obligations. Eventually, and pursuant to the oral London agreement, Telkom paid 60 per cent of the invoice.

[134] Telcordia claimed, as a self-contained claim 'B', payment of the balance of 40 per cent based on the allegation that the software complied with the FSDs, that Telkom, took delivery of the software, and had not paid the full price. In addition, Telcordia claimed amounts that were payable in respect of this software shipment at later pay points.

[135] Telcordia did not rely on the London agreement in its original statement of claim. Telkom, on the other hand, in Its answering pleading, did so. Its defence to the claim for payment was that the 40 per cent balance would have been paid in December 2000 'on condition that rectification by Telcordia of the discrepancies [Telkom's problems with the 06/00 release] was verified by Telkom'. Rectification of the software, it was alleged, had to take place by means of the 12/00 release, which had to remedy the critical gaps, and had to be verified by means of a demonstration of the 12/00 release during November 2000. Importantly, Telkom did not allege that the November demonstration was a precondition for its accepting delivery of the 12/00 shipment; and Telkom did not allege (in the pleadings or in the repudiation correspondence) that it was entitled to reject delivery of the 12/00 software on this ground. Nor did it in the counterclaim allege any breach of the demonstration undertaking.

[136] Although the London agreement was not one of the May issues, the wide ranging evidence covered it to some extent. Towards the conclusion of the argument

before the arbitrator Telkom had second thoughts about the agreement and tentatively argued that the London agreement might not have been covered by the arbitration clause and that in any event it might have been in conflict with *Shifren*.

[137] An affidavit with supporting documents was filed by Telcordia just before the conclusion of argument setting out its version of the London agreement. The documents gave the arbitrator the impression that Telkom's version about the precondition for payment was implausible. He then told Telkom that if it wished to dispute Telcordia's version it should file affidavits to that effect. In response Telkom then flied the evidence of two Telkom employees, Messrs Morgan and September. Their statements tended to confirm the allegations contained in Telkom's pleadings. However, they did not state that a pre-delivery demonstration (or anything else) was a precondition for acceptance of delivery of the 12/00 software.[102]

[138] The next stage in the proceedings was the filing of the s 20 application in which Telkom argued, as foreshadowed, that the high court should decide whether the London agreement fell outside the scope of the arbitration agreement. The arbitrator pointed out that the point is probably bad. I agree. It is difficult to see how a party to arbitration can rely on an agreement; fight the case on that basis; ask the arbitrator to hear evidence on the issue; complain that he failed to give enough attention to it; and when the shoe pinches claim that the agreement falls outside the purview of the arbitration. This is just another instance of Telkom's inconsistency in the conduct of its

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[102] The later letter of 9 January 2001 on which Telkom relies also does not support the existence of a precondition. In fact, a request at that late stage of 'some means/evidence' of compliance before payment (not

case. Telkom also raised the question whether, in any event, the London agreement was in breach of the *Shifren* principle.

[139] In the review application Telkom performed another dizzying pirouette. In the first set of affidavits Telkom attacked the award on the ground that the alleged November demonstration precondition had not been fulfilled but when the arbitrator stated in his Memorandum that he had made no findings with regard to the London agreement, Telkom - in the supplementary founding affidavit - alleged for the first time that the London agreement amounted to a separate and independent compromise agreement, which was not in conflict with *Shifren* and which made acceptance of the 12/00 software subject to two suspensive conditions.

[140] Telkom's case on review was that the arbitrator committed a gross irregularity in the proceedings by deciding the issue that Telkom's failure to take delivery of the 12/00 software could constitute. a repudiation. without hearing the evidence of Morgan and September about the two suspensive conditions, something he undertook to do. The arbitrator's undertaking on which Telkom relied was not in the terms Telkom suggests. The arbitrator asked for affidavits dealing with the pleaded issue surrounding the London agreement, namely the preconditions to payment of the 40 per cent. If, he said, there was a serious dispute on this issue he would require cross-examination. As he noted in his memorandum, Telkom neither pleaded nor advanced any case to the effect that the London agreement was determinative of Telcordia's delivery obligations under the Integrated Agreement.

[141] The arbitrator kept his promise: he did not decide the issue pleaded although he expressed the prima facie

view that Telkom's version was not suppurted by the documents.[103] Expressing prima facie views on common cause documents is not improper and can by no stretch of the imagination be considered to be an irregularity.

[142] There is accordingly no basis for the allegation that the arbitrator had failed to afford Telkom a hearing on this matter, which was not before him and was only articulated, without proper supporting evidence, during the review proceedings. He was entitled to ignore any evidence by Morgan and September that dealt with issues not pleaded (assuming they gave such evidence).

U. The Section 20 Issue

[143] This brings me to the last ground of review with which i shall deal. It concerns the events surrounding Telkom's s 20 application. Section 20 of the Act is in these terms:

> 'Statement of case for opinion of court or counsel during arbitration proceedings.—
>
> (1) An arbitration tribunal may, on the application of any party to the reference and shall, if the court, on the application of any such party, so directs, or if the parties to the reference so agree, at any stage before making a final award state any question of law arising in the course of the reference in the form of a special case for the opinion of the court or for the opinion of counsel.
>
> (2) An opinion referred to in subsection (1) shall be final and not subject to appeal and shall be binding

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[103] His statement that Morgan did not refute allegations made in a letter by Telcordia to Morgan was clearly a reference to the fact that Morgan did not respond at the time, This follows from the fact that he was at this stage only having regard to documents and not to affidavits.

on the arbitration tribunal and on the parties to the reference.'

[144] Telkom asked the arbitrator to state a number of questions of law by means of a special case for the opinion of the court. The arbitrator refused and proceeded to finalise his award. Telkom then launched an application to the high court, for an order that the arbitrator state a case. Before the application could be heard the award had already been published by the ICC. Upset, Telkom sought to review the arbitrator on two further grounds. As mentioned earlier, the first was that he committed a gross irregularity and exceeded his powers by refusing to state a case; and secondly, that he prevented Telkom from itself securing the statement of a case.[104] The first ground was abandoned before us.

[145] It will be recalled that the primary question raised in the May issues concerned the interpretation of the Integrated Agreement. interpretation is usually regarded as a legal question but it is not necessarily so. It may be a mixed question of fact and law, as the present case illustrates.[105] The remaining May issue raised the applicability of *Shifren* in relation to the moratorium agreement (the alternative response in Telcordia's second amendment). This Issue could only have arisen if the arbitrator had found against Telcordia on the primary question. After pre-hearings, three weeks of oral evidence (plus forests of paper evidence), argument written and oral, and at the conclusion of the latter on 1 August 2002, Telkom, patently fearing an unfavourable decision,

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[104] Relying on *Czamikow v Roth, Schmidt and Co* [1922] 2 KB 478 (CA).

[105] Cf *Dorman Long Swan Hunter (Pty) Ltd Y Karibib Visserye Ltd* 1984 (2) SA 462 (C) 474E-F.

suggested that the arbitrator should state a case concerning the applicability of *Shifren* in relation to the moratorium and London agreements. The arbitrator refused because, as he said, these issues were alternative issues and they might never arise, depending on his conclusion on the primary question. He also informed the parties that he proposed to go ahead with writing the award as quickly as possible.

[146] Two weeks later, an 14 August, Telkom tried another tactic. It now asked the arbitrator to state, in addition to the *Shifren* point, the primary question for an opinion by the court and requested him to defer his award if he was not prepared to accede to their request. The arbitrator (after obtaining Telcordia's answer) responded on 27 August by not only raising a number of valid concerns about the request to state a ease but by stating that his award would be available in final draft form shortly after 9 September; that he would then submit the draft to the ICC for consideration pursuant to its art 27;[106] and that he would inform the ICC of Telkom's request and leave it to the ICC.

[147] Without responding to the letter due to an oversight, Telkom issued its s 20 application. The founding affidavit was sworn on 28 August and the arbitrator informed of the application on 30 August. Keeping his word, the arbitrator submitted his draft award to the ICC on 9 September and informed the ICC of Telkom's request. Eventually, on 27 September the award was signed and on the same date the arbitrator submitted a report to court setting out his reasons for having refused Telkom's request

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[106] Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the (International Court of Arbitration). The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal's liberty of decision, may also draw its attention to points of substance. No Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.'

for a stated case. Apart from some general policy considerations he referred to the stage of the proceedings when the request was made; the incongruity in Telkom's stance; the evidence led; the wasted costs; the lateness of the requests; the close analogy between this instance and the *Midkon* case;[107] the importance of evidence for construing the Integrated Agreement; the fact that the s 20 option was not exercised within a reasonable time; and Telkom's changes of heart about the validity of the London agreement.

[148] In his report the arbitrator added that he did not accede to Telkom's request since it was a matter for the court to decide, implying that he preferred to leave the question of referral to the court. This implication, on which Telkom's submission about irrationality was based, is not understood because once the arbitrator had issued his award the court was precluded from ordering him to state a case for its opinion.

[149] The first question was whether the arbitrator in fact prevented Telkom from obtaining a court order. If he did, it would have amounted to an irregularity. On the facts as set out he did not. Telkom knew at the end of August that he was not going to delay the award. He gave them a timetable. According to existing South African law, as expressed in *Midkon*,[108] he had no duty to delay his award in order to enable Telkom to approach the court. Nobody prevented Telkom from asking in the notice of motion or thereafter for an interim order to delay the issuing of the award, which was the duty of the ICC and not of the arbitrator. This Telkom did not do.

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[107] *Govemment of the Republic of SA v Midkon (Pty) Ltd* 1984 (3) SA 552 (T).

[108] At 562E-G, 563E-G.

[150] There are further reasons why the award cannot be reviewed on the basis of 'irregularity' or irrationality. These require a discussion of the scope of s 20 and depend on whether Telkom had a 'right' under s 20 to approach the court, which right the arbitrator frustrated.

[151] The first matter I wish to address is the nature of the arbitrator's discretion. Eloff J, in *Kildrummy*,[109] sought to curtail the general and unrestricted discretion the section gives to the arbitrator. There is no reason, having regard to the wording of the section, for such an approach. Rules circumscribing the way any discretion has to be exercised are generally unacceptable. Eloff J sought to justify his approach with reference to a dictum by Denning MR in *Halfdan Grieg*.[110]

> 'When one party asks an arbitrator or umpire to state his award in the form of a special case, it is a matter for his discretion. If the issues are on matters of fact and not of law, he should refuse to state a case. If they raise a point of law, it depends on what the point of law is. He should agree to state a case whenever the facts, as proved or admitted before him, give rise to a point of law which fulfils these requisites. The point of law should be real and substantial and such as to be open to serious argument and appropriate for decision by a court of law . . . as distinct from a point which is dependent on the special expertise of the arbitrator or umpire . . . The point of law should be clear cut and capable of being accurately stated as a point of law -

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[109] *Administrator, Transvaal v Kildrummy Holdings (Pry) Ltd* 1978 (2) SA 124 (T).

[110] *Halfdan Grieg & Co A/S v Sterling Coal and Navigation Corp* [1973] 2 All ER 1073 at 1077c-g.

> as distinct from the dressing up of a matter of fact as if it were a point of law. The point of law should be of such importance that the resolution of it is necessary for the proper determination of the case - as distinct from a side issue of little importance.
>
> If those three requisites are satisfied, the arbitrator or umpire should state a case.

[152] The Master of the Rolls, it will be recalled from my discussion of *Anisminic*,[111] was a proponent of the view that all matters of law should fall within the sole domain of courts. The other judges who sat with Denning MR did not concur in this regard. Scarman LJ made it quite clear that the discretion is 'unqualified' (at 1083) and Megaw LJ was of the view that the exercise was not a matter of general principle but depended on the circumstances of the case (at 1080). Eloff J justified his adoption of the Denning test on the basis that our Legislature would have intended s 20 to have the meaning attached to a similar section by English courts. But as Preiss J mentioned in *Midkon*,[112] there is a vital distinction between our statute and the (now repealed) English statute. There is in any event no justification for presuming that our Legislature (past or present) Intended to give the meaning to words that foreign courts may have done, especially where the Denning test came after the passing of the Act.[113] Ultimately Eloff J relied on *Theron's* case,[114] which I have discussed earlier and all that I wish to

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[111] *Anisminic Ltd v Foreign Compensation Commission* [1969] 1 All ER 208 (HL).

[112] *Government of the Republic of SA v Midkon (Pty) Ltd* 1984 (3) SA 552 (T) at 562G-I.

[113] LC Steyn *Uitleg van Watte* 5 ed at 132.

[114] *Theron v Ring van Wellington van die NG Sendingkerk in SA* 1976 (2) SA 1 (A).

say is that the passage relied on was put in its correct perspective by this Court and that it does not support him.[115] In other words, I hold that there is no obligation on an arbitrator to state a case if the requirements set out by Denning MR are present. They are important factors to consider but they are not definitive. By way of a metaphorical footnote: The Denning approach gave rise to legislative action and what he had done to arbitration law was soon undone by the adoption of the Arbitration Act of 1979.[116]

[153] If an arbitrator decides not to state a case, the aggrieved party may under s 20 approach the high court- The court must then determine whether or not the arbitrator had erred in the exercise of his discretion as happened in both *Kildrummy and Midkon*. If there is no fault to be found with the arbitrator's exercise of his discretion, the court cannot order him to state a case. As mentioned, Telkom accepts that there was nothing wrong with the arbitrator's reasoning and that his refusal to state a case was justifiable. Once that is the case, the s 20 application was doomed from the outset especially since Telkom did not in that application seek to impugn the arbitrator's decision.

[154] Moreover, s 20 can be used only if the legal question arises 'in the course of the arbitration, it is not intended to apply where the parties agree to put a particular question of law to the arbitrator. Any other interpretation of the section would defeat its purpose and 'it would be futile

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[115] *Total Support Management (Pty) Ltd v Diversified Health Systems (SA) (Pty) Ltd* 2002 (4) SA 661 (SCA) para 19-21; *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 99-100.

[116] Michael Kerr 'The Arbitration Act 1979' (1980) 43 MLR 45.

ever to submit a question of law to an arbitrator.'[117] Its purpose, at the very least, is not to enable parties, who have agreed to refer a legal issue to an arbitrator to renege on their deal. They have in such a case chosen their decision-maker for the particular issue and they are bound by their choice. In this case, the primary question, as well as the validity of the moratorium agreement, was specifically referred to the arbitrator for his decision. To allow a party in these circumstances to utilise s 20 would frustrate the arbitration agreement. It is not against public policy to agree to the finality of an extra-curial decision on a legal issue especially where the review rights contained in s 33 remain available, enabling the courts to retain control over the fairness of the proceedings.'[118]

[155] Finally, a party does not have the right to have a hypothetical question stated because it does not in truth 'arise' in the arbitration proceedings. The arbitrator made it quite clear that the *Shifren* issue was at that stage hypothetical because it could only 'arise' once he had come to a conclusion on the primary interpretation question in favour of Telkom. In the event he concluded otherwise and the issue never arose.

[156] I therefore conclude that since Telkom had no right to approach the high court in the circumstances of the case the arbitrator did not infringe any of its rights when he, in the face of the s 20 application, proceeded to do what he said he would do.

V. Conclusion

[157] Cloete JA has dealt with the repudiation issue and I agree with his judgment, This means that the appeal has to

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[117] *In re King and Duveen* [1913] 2 KB 32 at 36 In a different context.

[118] Cf *Pioneer Shipping Ltd v BTP Tioxide Ltd* (1982] AC 724, 740

succeed with costs. Telcordia is in the circumstances of the case entitled to the costs of three counsel during all stages of the proceedings, including the petition for leave to appeal, which Telkom opposed,

W. The Order

[158] The following order is made:

(a) The appeal is upheld with costs, including those consequent on the employment of three counsel, which shall also be allowed in relation to the different stages of the application for leave to appeal.

(b) The order of the court a quo is set aside and in its stead the following order issues:

'The application is dismissed with costs, including the costs of three counsel.'

s/s
L T C HARMS
JUDGE OF APPEAL

CLOETE JA:

[159] The issues which remain for decision in this appeal are whether, as argued by Telkom, the arbitrator, in finding that Telkom had repudiated the Integrated Agreement so entitling Telcordia to cancel it, exceeded his authority or decided a question without evidence, thereby committing a gross irregularity. If this were to be the case, the dismissal of Telkom's counterclaim would also fall to be set aside.

[160] In the section of his award entitled 'Telcordia's delivery obligations' the arbitrator summarised Telcordia's argument as to its delivery obligations under the Integrated Agreement, and followed with a summary of Telkom's argument. In each instance, he also dealt with the parties'

respective contentions on repudiation. Reduced to the barest essentials Telcordia's argument was that its contractual obligations were to be found in the FSDs, whereas Telkom's argument was that Telcordia's contractual obligations were to be found in the SOCs. The arbitrator concluded that Telcordia's case was to be preferred and gave detailed reasons for this conclusion. In the next section of his award, entitled 'Termination of the Integrated Agreement: Telkom's Counterclaim', the arbitrator commenced by saying:

> '102, In their submissions to me both parties proceeded, quite correctly in my view, on the footing that the answer given to the question considered in the previous section of this Award would determine which party's termination of the Integrated Agreement was justified in law. Since, as I have found, Telcordia's tender of the December 2000 software release was in accordance with its contractual obligations, it must follow that Telkom's subsequent refusal to accept delivery of the software, or to go on with the contract, was a repudiation of the Integrated Agreement which Telcordia was entitled to accept as discharging the contract, by its letter dated 12 January 2001. It is clear law that the test for repudiation is an objective one, so that it makes no difference that Telkom may have considered that it was perfectly entitled to act as it did.'[119]

The arbitrator then said:

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[119] As authority for this latter proposition, the arbitrator referred to two decisions of this Court: *Metalmll (Pty) Ltd v AECI Explosives and Chemicals Ltd* 1994 (3) SA 673 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pry) Ltd* 2001 (2) SA 284 (SCA).

'103. It follows from the above that Telkom's counterclaim, which depends for Its validity on the proposition that the IA [Integrated Agreement] was properly terminated by it in consequence of Telcordia's breach, must fail.'

Several sections of the award follow, none of which are relevant for present purposes, before the concluding section entitled 'Formal Award'. The formal award reads in part:

'1. That the Answer to Question 1.1 in the List of Issues[120] to be determined by this Award is that the contractual baseline for determining the specific features and functionality of the software to be delivered by Telcordia to Telkom in each of the various software releases provided for in the IA is the Feature Specification Descriptions (FSDs) applicable to such release- Question 1.2 does not require a separate answer.

2. That the Answer to Question 2.1 in the said List of Issues is that on the true construction of the IA and in the events which happened Telcordia was required to *deliver software in June and December 2000 which complied with the FSDs in respect of each* of those software releases. Question 2.2 does not require a separate answer, and Question 3, does not arise.

4. That by refusing to take delivery of *software which complied, to all material respects, with the FSDs applicable to* the December 2000 software release Telkom repudiated the IA.

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[120] The List of Issues, also referred to as the May Issues, is set out in part H of the judgment of Harms JA.

5. That Telkom's counterclaims are dismissed.' (Italics added.)

It is necessary to emphasise for reasons which will became apparent that at no point prior to this had the arbitrator discussed the question whether the December 2000 ('12/00') software release complied with the FSDs applicable to it. All that he had said, in passing, was the following:

> 'It is to be noted that Telkom was not contending, and has not subsequently contended, that what was delivered by the December 2000 release was not in compliance with the FSDs. . .'.

[161] Telkom submitted that the arbitrator exceeded his powers in making any finding in regard to repudiation, as this was not covered by the May issues. Indeed, Telkom went so far as to say that the arbitrators finding was a 'dramatic development as contemplated in those cases in South Africa[121] and in England[122] which hold that it is a gross irregularity for an arbitrator to decide a dispute on a point that has not been put to the parties and on which they have not been heard. It is true that the May issues as originally formulated involved questions of interpretation

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[121] *Kannenberg v Gird* 1966 (4) SA 173 (C) at 186G-187E; *Lukral Investments (Pty) Ltd v Rent Control Board, Pretoria* 1969 (1) SA 496 (T) at 509C and 510E-511A; *Theron v Ring van Wellington, NG Sendingkerk In SA* 1976 (2) SA 1 (A) at 29C-F; *Steeledale Cladding (Pty) Ltd v Parsons* NO 2001 (2) SA 663 (D) at 672F-6731.

[122] *Societe Franca-Tunisienne D'Armement-Tunis v The Government of Ceylon (The "Massalla")* [1959] 2 Lloyd's Rep 1 (CA) at 13 and 17-18; *Montrose Canned Foods Ltd v Eric Wells (Merchants) Ltd* [1965] 1 Lloyd's Rep 597 (QBD) at 601-2; *Fox v Wellfair Ltd* [1981] 2 Lloyd's Rep 514 (CA) at 517, 520, 522 and 528-530; *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira")* [1984] 2 Lloyd's Rep 66 (CA) at 74-76.

of the Integrated Agreement and not performance of it. But the deponent to the replying affidavit delivered on behalf of Telkom in these proceedings said unequivocally:

> 'I admit that, during the course of the proceedings, the scope and focus of the issues widened and that, at the end of the May hearing, Telkom said that the Arbitrator should decide as many of the issues between the parties as could fairly be determined in the light of oral and documentary evidence presented during May.'

Indeed, by the end of the hearing in 2002, each party had requested the arbitrator to deal with its right to cancel on the basis of the evidence that had been placed before him. Telkom even sought judgment in respect of its counterclaim. The arbitrator's statement in para 102 of his award (quoted in the previous paragraph of this judgment) that the parties proceeded on the footing that his decision on Telcordia's delivery obligations would determine which party's termination of the Integrated Agreement was justified in law, is amply justified by the record, Far from being a 'dramatic event', the arbitrator did no more than what the parties had requested him to do.

[162] Telkom submitted that the arbitrator had nevertheless exceeded his authority, in that the question whether it had repudiated the Integrated Agreement could not fairly have been determined by the arbitrator on the evidence before him, because it might have been able to justify its conduct - which would not then have amounted to a repudiation - by showing that the 12/00 software release did not comply with the FSDs. The argument amounts to this: The arbitrator held that it had repudiated the Integrated Agreement by insisting that Telcordia perform in terms of its fallacious interpretation of the contract. But if the software tendered by Telcordia did not comply with the FSDs; that would have entitled it to refuse to receive the

software. Therefore if it can establish such non-compliance, its rejection of the software was justified. And If Its rejection was justified, it cannot amount to repudiation. The finding by the arbitrator that it had repudiated the Integrated Agreement was therefore premature and he exceeded his powers in making the finding at that stage of the arbitration. It must be borne in mind, as pointed out by Harms JA in para [89] of his judgment that it was within the power of the arbitrator to decide the scope of his mandate. That apart, there are at least three reasons why Telkom's contention must fail - two of fact, and one of law.

[163] First, as the arbitrator observed, it was never Telkom's case, either on the pleadings or during the 2002 hearing, that the 12/00 software release did not comply with the FSDs. Telkom sought in this court to argue the contrary. Its argument is unsustainable. So far as the pleadings are concerned, Telcordia alleged in its statement of claim that Telkom had repudiated the Integrated Agreement inter alia 'by refusing to take delivery of the December 2000 release notwithstanding that Telcordia tendered delivery of such release in accordance with the Project Plan and that Telkom is obliged to take delivery thereof. These allegations were simply 'disputed' by Telkom in its plea; but that bald denial was wholly inadequate to support a case that Telkom was entitled to reject the software tendered because it did not comply with the FSDs. A defendant who wishes to raise the *exceptio non adimpleti contractus* on the basis of an incomplete tender must particularise in the plea in what respects performance was defective and will ordinarily have to give evidence on this aspect first (although the overall onus to disprove the existence of the defects will remain on the plaintiff).[123] The reason is obvious: a plaintiff cannot be

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[123] *HA Millard and Son (Pty) Ltd v Enzenhofer* 1968 (1) SA 330 (T) at 332G-H.

expected to prove a negative where the complaints of the defendant are unknown. Furthermore, when Telcordia requested further particulars from Telkom as to the respects in which Telkom alleged that the software tendered in December 2000 failed to comply with Telcordia's delivery obligations, Telkom replied that Telcordia should have regard to the SOCs and the fact that the December release was required to contain all features and functionality necessary to achieve Non-Voice Flow-Thru. It was not even suggested that there was any discrepancy between the software tendered and the FSDs. In other words, Telkom's pleaded case involved a comparison of the FSDs with the SOCs and not a comparison between the software and the requirements of the FSDs.

[164] So far as the hearing is concerned, Telkom's counsel made it clear that Telkom did not follow the acceptance test procedure in respect of the software tendered, which is the procedure for which the Integrated Agreement provides to identify and remedy shortcomings in the software, because it was known that the software contained 'gaps' and would accordingly not comply with Telkom's interpretation of Telcordia's obligations. Telkom's counsel at no time suggested that Telkom was entitled to reject the 12/00 software release because it did not comply with the FSDs.

[165] The second reason why Telkom's argument that it could have justified its conduct by showing that the 12/00 software release did not comply with the FSDs must fail, is this. Telcordia was entitled to remedy any shortcomings during the subsequent testing process. The testing process could take place only over a period of time and only within Telkom's own systems and Telcordia was entitled and obliged through updates to rectify any problems. It was simply not open to Telkom to reject the software release on the basis that it did not comply with the FSDs, because the

contract contemplated that this could well be the case and it allowed Telcordia to cure any defects in the software within the time allowed for performance. The corollary to Telcordia% right is that Telkom was not entitled to refuse to accept the December software when it was tendered even if it did not fully comply with the FSDs - it was obliged to receive it and proceed with the testing process.

[166] In any event Telkom's argument is unsound in law. Telkom prayed in aid the *falsa causa non nocet* principle laid down in cases such as *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (A) and *Datacolor International (Pty) Ltd v Intamarket (Pty) Ltd* 2001 (2) SA 284 (SCA). Those cases hold that: 'Where a party seeks to terminate an agreement and relies upon a wrong reason to do so he is not bound thereby, but is entitled to take advantage of the existence of a justifiable reason for termination, notwithstanding the wrong reason he may have given'.[124] But this principle has no application in a case such as the present, where it is the other party who has cancelled the contract. In such a case, the party who repudiated cannot put the clock back and undo the valid cancellation by relying on a ground that he legitimately could have, but did not, advance, in substitution for the ground that he did advance and which resulted in the cancellation of the contract. Once cancelled, the contract is irrevocably at an end. The rule exists for the protection of an innocent party and does not enure to the benefit of a party guilty of a breach of contract: it does not entitle the latter to claim that, since it could have done something similar without breaching the contract, its breach had no adverse legal consequences.

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[124] *Putco* at 832C-D.

[167] Finally, Telkom submitted that the italicised part of para 4 of the arbitrator's award (quoted in para [160] above) constituted a finding that the 12/00 software release in fact complied with the FSDs applicable to it; and that as there had been no evidence on this point, the arbitrator's finding that it had repudiated the Integrated Agreement fell to be set aside on review. Paragraph 4 of the award must, however, be read in context. The fundamental issue between the parties was, as I have said, whether Telcordia's contractual obligations were to be detonated with reference to the FSDs (Telcordia's case) or the SOCs (Telkom's case). The arbitrator, in his detailed reasons which preceded the formal award, decided this issue in favour of Telcordia and embodied that decision in paras 1 and 2 of his formal award (also quoted in para [160] above). Once he had made this decision, and since it was not pleaded or argued by Telkom that the 12/00 software release did not in fact comply with the FSDs (as the arbitrator expressly noted), It followed that Telkom's rejection of the 12/00 software release was a repudiation of the Integrated Agreement. That was the finding embodied in para 4 of the arbitrator's formal award. In that paragraph the arbitrator did not intend additionally to decide that the December software release as a matter of fact accorded with the FSDs nor must that paragraph be interpreted as embodying such a finding; the arbitrator clearly intended merely to articulate the conclusion already reached by him, namely, that Telkom had repudiated the Integrated Agreement by rejecting software developed in accordance with the FSDs (as opposed to the SOCs). In the absence of a challenge by Telkom that the software did not in fact comply with the FSDs, it is not surprising that the arbitrator expressed himself as he did. If Telkom subsequently seeks to make out a case, in relation to the remaining issues relating to quantum not decided by the arbitrator's interim award, that the 12/00 software release did not comply in fact with the

FSDs applicable to it, it is entitled to do so - but its right to do so does not affect in any way the arbitrator's conclusion that it repudiated the Integrated Agreement.

[168] I therefore conclude that Telkom's attack on the arbitrator's finding that it repudiated the Integrated Agreement, is without merit. It follows that the arbitrator's dismissal of Telkom's counterclaim must stand. On the other issues raised in the appeal I respectfully agree with the reasoning and conclusions reached by Harms JA, and concur in the order made.

s/s
T D CLOETE
JUDGE OF APPEAL

Concur: Conradie JA
Lewis JA
Ponnan JA

Supreme Court, U.S.
FILED
FEB - 9 2007
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(4)

No. 06-663

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF

GRANT L. CLARK
SCIENCE APPLICATIONS INT'L CORP.
10260 Campus Point Drive
San Diego, CA 92121

CHARLES M. LIZZA
KEVIN R.J. SCHROTH
LEBOEUF, LAMB, GREENE & MACRAE LLP
125 West 55th Street
New York, NY 10019-5389

ALLEN B. GREEN
Counsel of Record
DANIEL G. JARCHO
WILLIAM T. O'BRIEN
DANIEL L. RUSSELL JR.
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, NW
Washington, DC 20006
(202) 496-7500

JAY G. SAFER
LORD, BISSELL & BROOK LLP
885 Third Avenue, 26th Floor
New York, NY 10022

Counsel for Respondent

RULE 29.6 DISCLOSURE

Telcordia Technologies, Inc. is a non-governmental party. Telcordia is owned by TTI Holding Corporation I, which is owned by Telcordia Holdings, Inc., which is owned equally by Providence Equity Partners Inc. and Warburg Pincus LLC.

I. INTRODUCTION

In its reply brief, Telkom raises a new argument, asserting that the Court should consider deferring its ruling on the Petition in this case pending the decision in *Sinochem International Co. v. Malaysia International Shipping Corp.*, No. 06-102 (U.S. argued Jan. 9, 2007). (Reply Br. at 7.) Because Telkom raised the argument for the first time in its reply brief, Telcordia has not had an opportunity to respond. Accordingly, Telcordia now files this supplemental brief pursuant to S. Ct. R. 15.8.

II. THIS CASE DOES NOT PRESENT THE SAME QUESTION THAT *SINOCHEM* PRESENTS

This case does not present the same question that *Sinochem* presents. The Court therefore should refuse to delay its ruling on Telkom's Petition.

In *Sinochem*, the district court did not resolve personal jurisdiction before dismissing the suit under the *forum non conveniens* doctrine. The question presented in *Sinochem* is whether the district court had authority to avoid a jurisdictional ruling and dismiss on other grounds:

> Whether a district court must first conclusively establish jurisdiction before dismissing a suit on the ground of *forum non conveniens*?

Pet. for Writ of Cert., *Sinochem*, No. 06-102 (July 21, 2006).

In the present case, by contrast, the district court *did not* avoid a jurisdictional ruling, so the question of its authority to do so did not arise. The district court below expressly held that the case must be dismissed for lack of personal jurisdiction. (Pet. App. 29a-30a.) This definitive jurisdictional ruling accompanied alternative rulings justifying the dismissal on other grounds (*i.e.*, estoppel). (Pet. App. 17a.) This case simply does not present the

question whether a district court can avoid determining personal jurisdiction and dismiss a suit without ever resolving the jurisdictional issue.

Furthermore, because the district court did rule on personal jurisdiction, neither party raised an argument, in the Third Circuit, about whether the district court *needed* to resolve personal jurisdiction. Instead the parties contested whether the definitive jurisdictional ruling that the district court had issued was erroneous. The Third Circuit held that personal jurisdiction did exist and then moved on to consider the district court's alternate grounds for dismissal. There can be no question that the Third Circuit was entitled to resolve jurisdiction before ruling on other issues. That is a wholly different question than the one presented in *Sinochem* – whether a court is entitled to *forego* a jurisdictional ruling and then rule on other issues.

III. CONCLUSION

There is no proper basis for deferring a ruling on Telkom's Petition pending the Court's decision in *Sinochem*. Deferring a ruling would unfairly delay Telcordia's longstanding efforts to obtain relief from Telkom for its breach of contract. The Court should promptly deny Telkom's Petition.

Respectfully submitted,

GRANT L. CLARK
SCIENCE APPLICATIONS INT'L CORP.
10260 Campus Point Drive
San Diego, CA 92121
(858) 826-5068

JAY G. SAFER
LORD, BISSELL & BROOK LLP
885 Third Avenue, 26th Floor
New York, NY 10022
(212) 812-8305

CHARLES M. LIZZA
KEVIN R.J. SCHROTH
LEBOEUF, LAMB, GREENE & MACRAE LLP
125 West 55th Street
New York, NY 10019-5389
(212) 424-8583

ALLEN B. GREEN
Counsel of Record
DANIEL G. JARCHO
WILLIAM T. O'BRIEN
DANIEL L. RUSSELL JR.
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Respondent

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No. 06-663

IN THE

Supreme Court of the United States

TELKOM S.A. LTD.,

Petitioner,

v.

TELCORDIA TECHNOLOGIES INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

EUGENE D. GULLAND
Counsel of Record
JOSHUA DOAN
ZACHARY G. PARKS

COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000
Attorney for Petitioner

RULE 29.6 DISCLOSURE

Telkom has no parent company. The Public Investment Corporation Limited is the only publicly held company that owns 10% or more of Telkom's stock.

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INTRODUCTION AND SUMMARY

Telkom's petition showed that the Third Circuit (i) disregarded accepted principles of issue preclusion when it entertained relitigation of the D.C. Circuit's decision denying enforcement of an arbitration award that was under review in South African courts, and (ii) also erred by going on to hold that U.S. courts may exercise personal jurisdiction over Telkom on the view that special standards should apply in actions to enforce foreign arbitral awards. Rather than come to grips with our showing that the Third Circuit's rulings conflict with decisions of this Court and other courts of appeal, respondent Telcordia makes three arguments that do not bear scrutiny.

First, it is untrue that the issues and "parties' arguments . . . were entirely different" in the D.C. Circuit and Third Circuit. (Opp. 6). In both courts, Telcordia attacked the proceedings in the South African High Court on the same grounds and sought immediate enforcement of the arbitral award. Moreover, the Third Circuit allowed successive enforcement actions *not* because it thought that the issues were different, but because it mistakenly ruled that the D.C. Circuit's judgment of dismissal could be relitigated because it was "without prejudice."

Second, it is untrue that the recent decision of the South African Supreme Court of Appeal ("SCA") reversing the High Court's decision "removes the estoppel issue from this case." (Opp. 19.) To the contrary, if allowed to stand, the Third Circuit's erroneous ruling will spawn mischievous relitigation in other cases. It will also prejudice Telkom because, instead of dismissing the case, the Third Circuit went on to rule incorrectly on personal jurisdiction questions it should never have reached. Telcordia will doubtless rely on this ruling in the new enforcement action it intends to file. Indeed, the

unnecessary resolution of the personal jurisdiction issue echoes the same Third Circuit practice that is challenged in another pending case, *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102.

Third, it is also untrue that the Third Circuit's ruling on personal jurisdiction is merely a fact-bound determination. The court was only able to reject the emphatic rulings to the contrary of two federal district courts by applying the special and unprecedented standard that it said should be applied in arbitral award enforcement litigation.

I. Telcordia's Analysis of the Estoppel Issue Mischaracterizes the Decision Below and the Relevant Law and Facts.

Telcordia insists that the Third Circuit ruled that issue preclusion did not apply because the issue before it was "entirely different" from the issue decided by the D.C. Circuit. (Opp. 6.) This argument has no basis in the decision below or in the facts of this case. The allegedly "different" issue – whether U.S. courts should enforce the arbitral award despite the High Court's decision vacating it – was before both courts. Indeed, the Third Circuit explained that it entertained Telcordia's enforcement case because it believed (wrongly) that only a "decision on the merits [is] entitled to preclusive import" (Pet. App. 12a), not because it believed the issues in the two cases were different.

Telcordia asserts that the question whether to enforce the award despite the High Court's decision "was never briefed or argued by the parties" in the D.C. Circuit. (Opp. 14.) But in its D.C. Circuit brief, Telcordia argued that (i) the High Court improperly "reviewed the merits of the arbitration," (ii) its enforcement action should "take precedence" over the "parallel" set-aside action in South Africa, and (iii) the High Court's "order is not controlling on this Court or the District Court, which have authority

to confirm the Award as issued. *See Chromalloy*, 939 F. Supp. at 908, 914-15."[1] (Br. of Appellant, No. 03-7099, at 47-48 & n.20 (D.C. Cir. Feb. 11, 2004).) The D.C. Circuit, however, refused to remand for enforcement of the award or even further consideration, observing, parenthetically, that "the High Court issued a decision setting aside the partial award, which Telcordia says it intends to appeal." (Pet. App. 43a.) The D.C. Circuit in short, rejected the argument that the award should be enforced despite the High Court's decision. Telcordia then filed its enforcement petition in New Jersey, arguing once again that the High Court proceeding "was an impermissible appeal of the merits" and, citing *Chromalloy*, urging that "[t]he Court therefore can confirm the Award." (Mem. in Support of Telcordia's Pet. to Confirm, No. 04-CV2463, at 22-23 (D.N.J. May 26, 2004).)

Telcordia's argument also fails because the Third Circuit did not base its estoppel ruling on any supposed difference in the issues presented in the successive enforcement cases. It instead held that Telcordia was not estopped from bringing multiple enforcement actions because, in its view, decisions on non-merits issues lack preclusive effect. Telcordia contests this reading of the court's opinion (Opp. 17), but this Court need only consult the six paragraphs in the decision below that address issue preclusion. (Pet. App. 11a-13a.) The first two sketch background facts, the last two address Telkom's forum-shopping argument, and the middle two explain the reasons for the court's decision to allow successive enforcement actions. These middle two paragraphs make

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[1] Telcordia's citation to *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) is particularly significant because that case is the only United States decision ever to enforce an award after annulment in the arbitral forum.

clear that the Third Circuit mistakenly believed that a dismissal on issue preclusion grounds would prevent Telcordia from "ever bring[ing]" a future enforcement case if the award were reinstated. (*Id.* 11a-12a.) To avoid this perceived result, the court held that only a "decision on the merits [is] entitled to preclusive import." (*Id.* 12a.)[2] It is therefore no surprise that Telcordia never cites the Third Circuit's opinion in the section of its opposition contending that the court based its decision on the differences between the issues presented in the successive enforcement actions. (Opp. 11-16.)[3]

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[2] These paragraphs provide, in full:

"For Telkom to be able to piggyback a dismissal without prejudice into a dismissal with prejudice is anathema to the 'wait-and-see' raison d'être of Article VI. Although we agree with Telkom that the decision is still pending in South Africa, given the fact that the case is currently working its way through South Africa's appeals process, the fact that Telcordia prematurely brought a case for enforcement in New Jersey should not predetermine its ability to ever bring a case in New Jersey, as would be the case if the dismissal was on the merits.

Put another way, this case would be very different if, for example, the D.C. Circuit had ruled pursuant to Article V and refused to enforce the award. *Such a decision would likely constitute a decision on the merits entitled to preclusive import. That is not the case here.* The D.C. Circuit opinion relied on Article VI rather than Article V." (Pet. App. 11a-12a (emphasis added).)

[3] Citing footnote eight of the opinion below, Telcordia elsewhere states that the issue before the Third Circuit was "whether new court proceedings can be instituted 'once a set of events have passed' in a foreign parallel proceeding." (Opp. 18 (quoting Pet. App. 12a n.8).) This misleading sentence suggests that the court below adjourned because it believed that "a set of events [had] passed" that would allow for relitigation of issues decided by the D.C. Circuit. The full sentence, however, makes an entirely different point: "Here, it is undisputed that (...continued)

Telcordia's reliance on the supposed differences in the issues further ignores that a non-merits dismissal cannot be relitigated in the absence of a change in "controlling" circumstances. A party cannot evade issue preclusion by "conjur[ing] up some factual element that ha[s] changed between adjudications." *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974). The cases Telcordia cites in its opposition make clear that issue preclusion applies when "the *controlling* facts and *applicable* legal rules remain unchanged." *Comm'r v. Sunnen*, 333 U.S. 591, 599-600 (1948) (emphasis added); *see also Montana v. United States*, 440 U.S. 147, 162 (1979) (issue preclusion applies when "the factual and legal context in which the [allegedly preclusive] issues [arose] has not *materially* altered") (emphasis added). In other words, "[a]ny factual differences between the two cases" must be of at least some "legal significance." *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 172 (1984).

Telcordia offers no reason why the "factual difference" it relies on – the same South African High Court decision that it attacked in both the D.C. and Third Circuits – is "controlling" or of any "legal significance." Put another way, Telcordia has not identified an intervening factual change that would have led the D.C. Circuit not to dismiss the enforcement action.

II. The South African Supreme Court Decision Does Not "Remove the Estoppel Issue From This Case."

Telcordia next contends that the Third Circuit's allowance of successive enforcement actions should not be

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Telcordia could rebring the petition in the D.C. District Court once a set of events have passed." (Pet. App. 12a n.8.)

reviewed because the estoppel issue has been "removed . . . from this case." (Opp. 19.) This is not true. Telcordia observes that it is no longer "estopped from returning to U.S district court to enforce" its award because, after Telkom filed its petition, the SCA reversed the High Court decision vacating the award. (*Id.*) This does not support the conclusion that the harmful consequences of the Third Circuit estoppel ruling are "no longer presented by this case." (*Id.*)

The Third Circuit's erroneous decision will not only invite relitigation of dismissals without prejudice from other circuits, but will also adversely affect Telkom. If Telkom were asking this Court for an order holding that Telcordia is estopped from returning to a U.S. district court to enforce its award, then its petition might be moot because this Court could not grant Telkom the "effectual relief" it sought. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (citation and quotation marks omitted) (holding that an appeal is moot if it is "impossible for a court to grant any effectual relief whatever to a prevailing party"). But Telkom is not now seeking, nor has it ever sought, such an order. Telkom instead simply desires to defend itself in Telcordia's new anticipated confirmation action without having to contend with the Third Circuit's ruling that Telkom is subject to the personal jurisdiction of United States courts for the special purpose of an enforcement action.

This Court's power to grant this "effectual relief" is unaffected by the decision in South Africa. In fact, that decision increases the need to correct the Third Circuit's errors. Because Telcordia says it will now refile its confirmation action, Telkom must defend itself against the Third Circuit's decision to subject it to the personal jurisdiction of United States courts. (Pet. App. 7a-11a.) This adverse (and erroneous) decision would not have been reached had the court affirmed the District Court's dismissal on issue preclusion grounds.

The prejudice Telkom will suffer from the decision below belies Telcordia's assertion that this case is not "worthy of this Court's review." (Opp. 1.) Just this term, this Court granted certiorari in *Sinochem International Co., Ltd. v. Malaysia International Shipping Corp.*, No. 06-102, to review the Third Circuit's holding that a district court erred by dismissing a lawsuit on grounds of forum non conveniens without first deciding whether it had personal jurisdiction. At issue is the Third Circuit's rule that federal courts must determine their personal jurisdiction before dismissing any cases – even on non-merits grounds. *Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., Ltd.*, 436 F.3d 349, 366 (3d Cir. 2006), *cert. granted*, 75 U.S.L.W. 3035 (U.S. Sept. 26, 2006) (No. 06-102).[4]

In its decision below, the Third Circuit followed this peculiar practice. Instead of simply affirming the District Court's dismissal on estoppel or adjournment grounds, the court, presumably following *Sinochem*, unnecessarily reached the personal jurisdiction question. This Court's decision to review a similar ruling in *Sinochem* weighs heavily in favor of granting certiorari in this case or in vacating the decision below if this Court reverses *Sinochem*.

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[4] The *Sinochem* court reached this decision notwithstanding this Court's holding in *Ruhrgas AG v. Marathon Oil Co.* that "a court [may] dismiss[] on . . . *non-merits grounds* such as . . . personal jurisdiction[] before finding subject-matter jurisdiction." 526 U.S. 574, 584-85 (1999) (emphasis added); *see also Penobscot Nation v. Georgia-Pacific Corp.* 254 F.3d 317, 324 (1st Cir. 2001) (district courts are not required to address jurisdictional issues when they dismiss on estoppel grounds).

III. The Third Circuit Applied An Unprecedented Standard Of Personal Jurisdiction For Foreign Arbitral Award Enforcement Actions.

Telcordia also contends that the Third Circuit's ruling that U.S. courts may exercise personal jurisdiction over Telkom in an arbitral enforcement action is "inextricably bound to the . . . facts," raising no issue worthy of this Court's attention. (Opp. 22.) To the contrary, the Third Circuit departed from settled principles when it applied an unprecedented standard for exercising personal jurisdiction in actions to enforce foreign arbitral awards and overrode the decisions of two district courts that had both ruled on undisputed facts that it would be unreasonable to exercise personal jurisdiction over Telkom.

The district courts each held that this Court's decisions clearly preclude exercising personal jurisdiction over Telkom where the parties had negotiated and signed the contract at issue in South Africa, required Telcordia to open an office there from which to perform its obligations under the contract, provided that the contract would be governed by South African law and that any disputes would be arbitrated there, submitted to the jurisdiction of South African courts, and conducted almost all of their dealings there. (Pet. App. 25a.) In addition, "key Telcordia personnel relocated to South Africa, all deliveries were made in South Africa, and Telcordia rendered its invoices to Telkom in South Africa." (*Id.* 19a). In contrast, contacts with the United States, such as visits by Telkom officials to New Jersey, were "merely incidental to the contract" and Telcordia's New Jersey headquarters. (*Id.* 27a). As the district courts found, the "contract, and the parties' performance thereof [we]re tied to South Africa in virtually all respects." (*Id.*)

To justify its departure from settled principles governing personal jurisdiction, the Third Circuit applied a new standard that focuses on the nature of the

proceeding before it, rather than the quality of the parties' contacts with the United States. Under this standard, which was premised on "the desire to have portability of arbitral awards," the court ruled that Telkom should have "'reasonably anticipated being haled into' a New Jersey court" because "the proceeding was for the enforcement of an arbitral award rather than adjudication on the merits." (*Id.* 10a.) There is no basis for Telcordia's assertion that the Third Circuit did not mean what it said. (Opp. 25-26.)

Furthermore, instead of addressing our showing that the Third Circuit's standard departs from the decisions of three other courts of appeal that have refused to adopt a special standard in arbitral enforcement actions, Telcordia makes the irrelevant argument that the facts of those cases differed in various respects that are not material to the question presented. (Opp. 27-29.) *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120 (9th Cir. 2002); *Base Metal Trading Ltd. v. OJSC Novokuznetsky Aluminum Factory*, 283 F.3d 208 (4th Cir. 2002); *Creighton Ltd. v. Qatar*, 181 F.3d 118 (D.C. Cir. 1999).

In ruling that U.S. courts have no personal jurisdiction over Telkom, the Third Circuit's rejection of *Creighton* was explicit. The D.C. District Court had followed *Creighton*'s holding that a foreign purchaser does not purposefully avail itself of the laws of the United States or submit itself to personal jurisdiction in U.S. court by agreeing in a contract with a U.S. vendor to arbitrate disputes abroad. (Pet. App. 36a-37a.) The Third Circuit faulted the New Jersey District Court for reaching the same conclusion, explaining that the D.C. District Court had viewed the facts "through the lens of D.C. Circuit law" rather than "through the lens of Third Circuit law." (*Id.* 9a.) In this additional respect, Telcordia's argument that the Third Circuit did not apply a conflicting personal-jurisdiction standard is untenable. Nor is there any relevance to the fact that Telkom was

privatized after Telcordia filed its D.C. District Court action. (Opp. 22 & n.7.)[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EUGENE D. GULLAND
Counsel of Record
JOSHUA DOAN
ZACHARY G. PARKS

COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000
Attorneys for Petitioner

26 January 2007

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[5] The resolution of the personal jurisdiction issue should have been the same in New Jersey and the District of Columbia because in both cases the courts looked to Telkom's nationwide contacts with the United States. Indeed, Telcordia could have filed its initial confirmation action in New Jersey because it at all times contended that "a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated" in New Jersey. 28 U.S.C. § 1391(f)(1). Instead, it filed in the District of Columbia because it wrongly guessed that the court would follow *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).